CLERK'S COPY.

VOLUME I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 442

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

EXPRESS PUBLISHING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. EXPRESS PUBLISHING COMPANY, a corporation, Respondent.	9408 November Term, 1939

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed January 22, 1940)

To the Honorable, the Judges of the United States Circuit Court of Appeales for the Fifth Circuit:

The National Labor Relations Board, pursuant to the

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.), respectfully petitions this Court for the enforcement of an order issued by it against respondent, Express Publishing Company, a corporation, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Express Publishing Company and San Antonio Newspaper Guild," Case No. C-1071."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Texas corporation, engaged in business in the State of Texas, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with the Court herein, to which reference is hereby made, and including, without limitation, a complaint and notice of hearing, respondent's answer, hearing for the purpose of taking testimony and receiving other evidence, intermediate report and respondent's exceptions thereto, and oral argument before the Board, the Board, on July 28, 1939, duly stated its findings of fact and conclusions of law and issued the following order, directed to respondent and its officers, agents, successors, and assigns:

1a

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor relations Board hereby orders that Express Pub-

lishing Company, San Antonio, Texas, and its officers, agents, successors, and assigns shall

1. Cease and desist from:

(a) Refusing to bargaining collectively with San Antonio Newspaper Guild as the exclusive representative of the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers in the editorial departments of both the San Antonio Express and San Antonio News;

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with the San Antonio Newspaper Guild as the exclusive representative of the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers in the editorial departments of both the San Antonio Express and San Antonio News, with respect to rates of pay, hours of employment, and other conditions of employment, and if an understanding is reached on any such matters, embody said understanding in a signed agreement, if requested to do so by the Guild;

(b) Post immediately notices to its employees

in conspicuous places within the plant, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting; stating (1) that respondent will cease and desist as aforesaid, and (2) that the respondent will bargain collectively with San Antonio Newspaper Guild as the representative of its city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers, in the editorial departments of the San Antonio News and San Antonio Express, with respect to rates of pay, hours of employment, and other conditions of employment and that if an understanding is reached on any such matters the respondent will embody said understanding in a signed agreement, if requested to do so by the Guild;

(c) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

(3) On July 28, 1939, the Board's decision and order were served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Leroy G. Denham, its attorney, in San Antonio, Texas.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions de-

termined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in the transcript, and upon the order made thereon, set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board and requiring respondent and its officers, agents, successors and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD

By s/ Robert B. Watts,
Associate General Counsel

Dated at Washington, D. C.,
this 19th day of January 1940.

1c DISTRICT OF COLUMBIA, ss:

Robert B. Watts, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he had read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information, and belief.

s/ ROBERT B. WATTS

Subscribed and sworn to before me this 19 day of January 1940.

(Signed) JOHN E. LOUYER

(Seal) Notary Public, District of Columbia

My Commission expires August 31, 1944.

1d IN THE UNITED STATES CIRCUIT COURT

OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. } 9408

EXPRESS PUBLISHING COMPANY,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board by its Secretary, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board, Series 2, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled "In the Matter of Express Publishing Company and San Antonio Newspaper Guild," the same being Case No. C-1071 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Amended charge filed by San Antonio Newspaper Guild, sworn to August 17, 1938.

2. Complaint and notice of hearing issued by the National Labor Relations Board, dated September 22, 1938.

3. Respondent's answer to the complaint, sworn to September 29, 1939.

4. Certified copy of order designating William P. Webb Trial Examiner for the National Labor Relations Board, dated October 4, 1938.

1e Documents listed hereinabove under items 1-4, inclusive, are contained in the exhibits and included under the following items:

5. Stenographic transcript of testimony before William P. Webb, Trial Examiner for the National Labor Relations Board, on October 6, 1938, together with all exhibits introduced in evidence.

6. Copy of intermediate report of Trial Examiner Webb, dated November 25, 1938.

7. Copy of respondent's exceptions to the intermediate report.

8. Copy of respondent's letter, dated November 30, 1938, requesting oral argument.

9. Copy of notice of hearing for purpose of oral argument, dated March 10, 1939.

10. Copy of list of appearances at oral argument held March 21, 1939.

11. Copy of decision, findings of fact, conclusions of law and order issued by the National Labor Relations Board July 28; 1939, together with affidavit of service and United States Post Office return receipts thereof.

IN TESTIMONY WHEREOF the Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 18th day of January, 1940.

NATHAN WITT, Secretary

(Seal) National Labor Relations Board

2 UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

16th Region

In the Matter of	
EXPRESS PUBLISHING COMPANY	
and	Case No. XVI C-293
	Filed August 11, 1939
SAN ANTONIO NEWPAPER GUILD	

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Express Publishing Company of San Antonio, Texas has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of said Act, in that

On March 14, March 30, April 21, and May 23 of 1938, it by its officers, agents and employees refused to bargain in good faith collectively with the authorized agents (representatives) of the San Antonio Newspaper Guild, chosen by a majority of its employees in its editorial departments, to represent them for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

By the acts set forth in the paragraph above, and by other acts and conduct, it by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

NATIONAL LABOR RELATIONS BOARD

Case No. XVI
Board V
Petitioner
Respondent
Intervenor
Exhibit IA

IN THE MATTER OF

EXPRESS PUBLISHING CO.

SAN ANTONIO NEWSPAPER GUILD

Date 10-6-1938

DANIEL W. ROSS,
Official Reporter
By HALL ETTER

The undersigned further charges that said unfair labor

practices are unfair labor practices affecting commerce within the meaning of said Act.

SAN ANTONIO NEWSPAPER GUILD

By: FRANK G. RAGSDALE, President

11 Circle Street

San Antonio, Texas

Subscribed and sworn to before me this 17th day of August, 1938 At San Antonio, Texas

JAMES A. SMITH

Notary Public, Bexar County,

Texas

3 UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

In the Matter of EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD	Case No. XVI-C-293

COMPLAINT

It having been charged by the San Antonio Newspaper Guild, a labor organization, that the Express Publishing Company, hereinafter referred to as the respondent, has engaged and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board, by its Regional Director for the Sixteenth Region, as agent of the National Labor Relations Board, designated by National Labor Relations Board Rules and Regulations, Series 1, as amended, Article IV, Section 1, hereby issues its complaint and alleges the following:

1. The respondent is and has been since 1865 a corporation organized under and existing by virtue of the laws of the State of Texas with its domicile and principal place of business in the City of San Antonio, County of Bexar, State of Texas, and is now and was at all times hereinafter mentioned engaged in the gathering of news, the publication, sale and distribution of two daily newspapers, the San Antonio Express, a morning paper, and the San Antonio News, an evening paper; and in the purchase of newsprint, ink, and various other articles used in the above-described operations, and in the purchase and publication of news items and columns, feature stories and comics from international and interstate news services
4 for use in the publication of its aforementioned newspapers.

2. The respondent, in the course and conduct of its business, causes and has continuously caused a large part of the raw materials and newspaper items used in the publication of its newspapers to be purchased, transported and transmitted in interstate commerce from and through states of the United States other than the State of Texas, and from and through foreign countries to its plant in San Antonio in the State of Texas, and causes and has continu-

ously caused a large number of its newspapers to be distributed and transported from its plant in San Antonio, Texas, to, into and through states of the United States other than the State of Texas.

3. The San Antonio Newspaper Guild is a labor organization as defined in Section 2, subsection (5) of the National Labor Relations Act.

4. All those employees of the respondent engaged in its editorial departments, namely, City Editors, Reporters, Copy Desk Men, Rewrite Men, Artists, Photographers, Copy Boys, Librarians, Sports Editors and Writers and Society Editors and Writers, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act, hereinafter referred to as the Act, in order to insure to respondent's employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of said Act.

5. On or about February 15, 1938, and at all times thereafter, a majority of the employees in said unit had designated said San Antonio Newspaper Guild as their representative for collective bargaining with the respondent, such designation having been made by signed authorization of each of the employees so designating said union. Thus on or about February 15, 1938, said San Antonio Newspaper Guild became and has at all times thereafter been a representative for collective bargaining of a majority of employees in said unit and has by virtue of Section 9 (a) of said Act been the exclusive representative of all employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

6. On or about March 14, 1938, and at various dates thereafter, particularly, March 30, 1938, April 21, 1938,

and May 23, 1938, while the respondent was engaged in its business as above set forth, said San Antonio Newspaper Guild, acting by and through its duly authorized representatives Frank Ragsdale, Henry B. Dielmann and others, requested respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other conditions of employment with said San Antonio Newspaper Guild as the exclusive representative of all the employees in the unit above described. On said dates and at all times thereafter, respondent did refuse, has refused and does now refuse to bargain collectively with said San Antonio Newspaper Guild as the exclusive representative of all the employees in said unit in that, though respondent met with the representatives above named and expresses itself as willing to meet again, the respondent has consistently refused to agree to any request made by the union and has refused to offer any character of counter-proposal to said union.

7. Said acts of the respondent as set forth in paragraph 6 above constitute unfair labor practices within the meaning of Section 8, subsection (5) of said Act.

8. The respondent, by its officers, agents and employees, namely, Thornton Hall, on April 4, 1938, called a meeting of Editorial Department employees and stated there, "Existing independent employment relations may be continued by the individual employees or by employees as a group," and further, "No one can compel you to join any organization;" and further referring to respondent' treatment of its employees, stated, "Each of you know we were not forced to do this by any labor organization, and no labor organization can force us to do these things;" and made further statements, well known to respondent, (intending to) having the effect of discouraging membership in said San Antonio Newspaper Guild.

9. By the refusal to bargain collectively with the San Antonio Newspaper Guild as set forth in paragraph 6 above and by the statements and other activi-

ties described in paragraph 8 above, and by various and sundry other means well known to respondent, respondent did interfere with, restrain and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, and by such acts did engage in and is engaging in unfair labor practices within the meaning of Section 8, subsection (1), of said Act.

10. The activities of respondent set forth in paragraphs 6, 7, 8, and 9 above, occurring in connection with the operations of respondent described in paragraphs 1 and 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The aforesaid acts of respondent enumerated in paragraphs 6, 7, 8, and 9 above constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (5), and Section 2, subsections (6) and (7), of said Act.

WHEREFORE, the National Labor Relations Board on this 22nd day of September, 1938, issues its complaint against the Express Publishing Company, the respondent herein.

7 AMENDED CHARGE FILED BY SAN ANTONIO NEWSPAPER GUILD, omitted from the printed record, being heretofore copied at page —.

See original transcript page 2.

8 NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 6th day of October, 1938, at ten o'clock in the forenoon, in the 37th District Court Room, County Court House, in the City of San

Antonio, Texas, a hearing will be conducted before the National Labor Relations Board by a trial examiner to be designated by it in accordance with said Rules and Regulations—Series 1, as amended, Article IV, Section 2, and Article II, Section 23, on the allegations set forth in the complaint attached hereto, at which time and place you will have the right to appear, in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Regional Director for the Sixteenth Region, with offices at 420 United States Court House, Fort Worth, Texas, acting in this matter as Agent of the National Labor Relations Board, an answer to the attached complaint on or before the 1st day of October, 1938.

Enclosed herewith for your information is a copy of Rules and Regulations—Series 1, as amended, made and published by the National Labor Relations Board pursuant to authority granted in the National Labor Relations Act. Your attention is particularly invited to Article II of said Rules and Regulations.

A copy of the amended charge filed herein is also attached hereto.

IN WITNESS WHEREOF the National Labor Relations Board has caused this, its complaint and notice of hearing, to be signed by the Regional Director for the Sixteenth Region on the 22nd day of September, 1938.

EDWIN A. ELLIOTT, Regional Director

Sixteenth Region, National Labor

(Seal) Relations Board

9 UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

In the Matter of Express Publishing Company and San Antonio Newspaper Guild	Case No. XVI-C-293

ANSWER

The Express Publishing Company, in response to the complaint filed herein, says:

A. The Board has no jurisdiction hereof, because the matter does not involve interstate commerce or anything within the Federal jurisdiction.

B. The Board does not have jurisdiction, because the respondent's business, being a local business within the State of Texas, is not subject to jurisdiction of said Board.

C. The Board does not have jurisdiction, because if any portion of respondent's business consists of interstate commerce, its relationship to the matters involved herein is so indirect and inconsequential that the matter involved herein is not within the jurisdiction.

C (1) The complaint in paragraph 8 is defective and fails to comply with Section 4 (c) of Article II of the Board

Rules in averring Hall "made further statements" without identifying the statements.

10 D. The complaint, in paragraph 6, is defective and fails to comply with Section 4 (c) of Article II of the Rules and Regulations of the Board in that it avers that the San Antonio Newspaper Guild, acting by and through its duly authorized representatives Frank Ragsdale and Henry B. Dielman and others, requested respondent to bargain collectively, and fails to state the names of the individuals referred to by the term "and others", so that the respondent is unable to properly answer or prepare for trial thereon, and the said complaint should be dismissed or the said phrase "and others" stricken out, or an amendment of the complaint be required to specify such names.

E. The complaint in paragraph 9 is defective and fails to comply with Section 4 (c) of Article II of the Rules and Regulations of the Board in that it avers that by an alleged refusal to bargain collectively as set forth in the allegations of paragraph 6 and by the allegations in paragraph 8, "and by various and sundry other means well known to respondent" that respondent interfered with, restrained, coerced, etc. employees, and fails to specify or designate the various and sundry other means referrd to, and threfore fails to comply with said rule requiring a clear and concise statement of the facts constituting the alleged unfair labor practice or the names of individuals involved, and the time and place of occurrence, so that respondent is insufficiently advised of what complaint is made against respondent, so that respondent cannot properly plead or prepare for trial thereon, and re-

11 spondent says that said complaint should be dismissed, or the words "and by various and sundry other means well known to respondent" should be stricken out, or that an amendment should be required to the said complaint requiring compliance as aforesaid with the said rule.

F. The amended charge, a copy of which is attached to the complaint, after specifying certain alleged actions on the part of the respondent, states that by the acts set forth in said paragraph "and by other acts and conduct it by its officers, agents and employees" interfered with, restrained and coerced ites employees, and fails to specify or designate the other acts and conduct referred to, and therefore fails to comply with said rule requiring a clear and concise statement of the facts constituting the alleged unfair labor practice or the names of individuals involved, and the time and place of occurrence, so that respondent is insufficiently advised of what complaint is made against respondent, so that respondent cannot properly plead or prepare for trial thereon, and respondent says that said complaint should be dismissed, or the said words "and by other acts and conduct it by its officers, agents and employees", should be stricken out, or that an amendment should be required to the said complaint requiring compliance as aforesaid with the said rule.

WHEREFORE, the respondent prays that the Board sustain each of the foregoing objections and motions to dismiss.

12 Subject to the foregoing objections to the jurisdiction and motions, and without waiving them, in response to the complaint respondent says:

1. Respondent admits the allegations of paragraph 1.

2. Answering paragraph 2, admits that the respondent has caused a large part of such raw materials as blank paper to be purchased and delivered from out of the State of Texas to respondent in the State of Texas, but avers that the said blank paper is merely incidental to respondent's business, the fundamental and major portion thereof being the writing of news items, editorial matter and other writing published by the respondent and the print-

ing thereof, said blank paper being merely incidental thereto;

Denies that the larger portion of the newspaper items used in the publication thereof are purchased, transported and transmitted in interstate commerce from without the State of Texas, averring on the contrary that the greater portion thereof are in part written by local employees and local staff within the State of Texas employed by respondent, and in part purchased from news agencies having offices within the State of Texas and delivered by such agencies from their offices within the State of Texas, and the small portion thereof purchased from out of the State of Texas is incidental and insignificant in comparison with the total and forms an insignificant and incidental portion of the respondent's business;

Denies that it obtains any other materials or items of consequent from without the State.

In response to the allegation that it causes and has caused a large number of its newspapers to be
13 distributed and transported from its plant in San Antonio, Texas to points outside of the State of Texas, respondent avers that only a very small percentage of its newspapers are caused to be distributed by it or transported by it outside of the State of Texas, the said portion being so small as to be inconsequential and incidental and not to materially affect its business or the matters involved herein or interstate commerce.

3. Respondent is without information as to the facts alleged in paragraph 3.

4. Respondent is without information as to the facts alleged in paragraph 4.

5. Respondent is without information as to the allegation in paragraph 5 of the complaint to the effect that the

majority of the employees therein mentioned designated the San Antonio Newspaper Guild as their representative in the manner therein set out and that said Guild was and is their representative for the purposes therein specified, except that the negotiators referred to in the said complaint and the said Guild stated to respondent the substance thereof, and therefore, being without personal information the respondent is unable to either admit or deny the same.

6. Admits the allegations that on or about the dates specified the Guild, acting through the representatives named in paragraph 6, requested respondent to bargain collectively with said Guild; is without information as to any requests on any other dates than those specified or of the other dates referred to by the complaint. And in response to the allegation that respondent refused to bargain collectively in that respondent refused to
14 agree to any request made by the Union, says that respondent did refuse to agree to the contract tendered by the Union, but says that respondent did negotiate with reference thereto with the said negotiators in full accord with the terms of the National Labor Relations Act, and the representatives of said Union insisted on tendering the same contract although they admitted the terms thereof were out of question and not justified or warranted, and that they could not expect an acceptance thereof; and if by said allegation in the complaint that respondent refused to agree to any request made by the Union the said contract is referred to, then respondent admits that it refused to agree to the said contract; but if any other request is referred to, then respondent is without information as to what request is referred to and therefore is without information to respond thereto, but says that it did agree to various requests with reference thereto in that, in accordance with the request of said Union it negotiated at each of said meetings on the dates mentioned in said contract with reference thereto and complied with the requests of the Union to meet and nego-

tiate in reference thereto, although the said negotiations did not result in an agreement as to entering into the said contract.

In response to that portion of said paragraph in which it is alleged that respondent refused to bargain collectively in that respondent has refused to offer any character of counter proposal to said Union, respondent says that it offered to continue the present terms of employment, and further says that its action did not constitute a refusal to bargain collectively.

15 7. Denies the allegations of paragraph 7.

8. Admits that Thornton Hall made a statement at the meeting referred to containing words quoted in said paragraph, but says that said words as quoted are mere parts of sentences and are quoted in a garbled manner so that they do not express the full and fair sense of the said statement.

Denies that any statements so made were intended to have the effect of discouraging membership in said Guild.

9. Denies the allegations of paragraph 9.

10. Denies the allegations of paragraph 10.

11. Denies the allegations of paragraph 11.

12. In further response to the said complaint, respondent says that respondent met with the negotiaters named in the complaint and negotiated with them at great length in full compliance with the National Labor Relations Act; that the said negotiaters presented a form of contract and requested respondent to accept it; that respondent after giving careful study to said contract refused to agree to its terms, stating in writing in detail the reasons why the contract was considered unreasonable;

that the negotiaters admitted that the terms of the contract were unjustified and that respondent could not be expected to accept them; that at the subsequent meeting the negotiaters still presented the same contract and further negoiations were had with reference to it and the respondent still refused to agree to it on the ground that its terms were unreasonable and the negotiaters for the Union again admitted that its terms were unjustified; that no other proposal was ever submitted to respondent; that the Guild's representatives, and not the respondent, terminated the said negotiations, and the respondent ex-
16 pressed its willingness to continue the negotiations if the Guild desired to continue them and to again meet for further negotiations if the Guild desired to meet therefor. And respondent says that it did negotiate in full compliance in all things with the said Act and the fact that it did not agree to the contract proposed by the Guild does not constitute a violation of the National Labor Relations Act.

Respectfully submitted,

EXPRESS PUBLISHING COMPANY

By Frank G. Huntress

President

Subscribed and sworn to before me by Frank G. Huntress, President, this 29 day of September, A. D. 1938.

W. A. DRUCE

Notary Public within and for

(Seal) Bexar County, Texas

DENMAN, FRANKLIN DENMAN

LEROY G. DENMAN

Attorneys for Respondent

Post Office Address:

San Antonio, Texas

17 UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

I, Nathan Witt, Secretary of the National Labor Relations Board, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of:

Order Designation Trial Examiner in the Matter of EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD, Case No. XVI-C-293

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the National Labor Relations Board to be affixed this fourth day of October A. D. 1938, at Washington, D. C.

NATHAN WITT

(Seal) Secretary.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD	Case No. XVI-C-293

ORDER DESIGNATING TRIAL EXAMINER

A charge having been filed in this matter, and it having appeared to the Regional Director of the Sixteenth Region that a proceeding in respect thereto should be instituted, and the Board having considered the matter and being advised in the premises,

IT IS HEREBY ORDERED that William P. Webb act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 1, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., October 4, 1938.

By direction of the Board:

GEORGE O. PRATT

Chief Trial Examiner.

NATIONAL LABOR RELATIONS BOARD

Case No. XVI-C-293 { Board √ / Petitioner / Respondent / Intervenor } Exhibit No. 2

IN THE MATTER OF SAN ANTONIO EXPRESS

Date 10-6-38 Witness.....

DANIEL W. ROSS,

Official Reporter

By HALL ETTER

19 UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

In the Matter of	
EXPRESS PUBLISHING COMPANY	
and	Case No. XVI-C-293
SAN ANTONIO NEWSPAPER GUILD	C-1071

INTERMEDIATE REPORT

Upon charges duly made and acting pursuant to proper authority, the National Labor Relations Board, by Edwin

A. Elliott, its Regional Director for the Sixteenth Region, issued its complaint against Express Publishing Company, the respondent herein. The complaint and notice of hearing thereon were duly served upon the respondent.

The complaint alleged that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act.[1] The respondent's answer admitted some of the specific facts alleged in the complaint, but denied that it had engaged in any unfair labor practices.

The undersigned, as duly designated Trial Examiner of the National Labor Relations Board, conducted a hearing on October 6, 1938, at San Antonio, Texas, at which place all parties were afforded an opportunity to participate in the hearing, to call, examine and cross-examine witnesses, and introduce other evidence.

20 At the conclusion of the hearing, the parties were afforded a reasonable opportunity to argue orally before the undersigned, and were advised by the undersigned that they would be given an opportunity for oral argument before the Board upon request to the Board made within ten (10) days from the receipt of the Intermediate Report. The parties were further advised that they might file briefs with the undersigned within ten (10) days from the close of the hearing. The undersigned has had the benefit of a brief submitted by counsel for the respondent. At the beginning of the hearing, counsel for respondent made several motions to dismiss the complaint, also certain paragraphs of the complaint, and that certain portions of the amended charge be stricken or the complaint be amended. Ruling was reserved on said motions, which are, at this time, denied.

1 The National Labor Relations Act is herein referred to as the Act; the National Labor Relations Board as the Board; the San Antonio Newspaper Guild as the Guild; and the Express Publishing Company as the respondent.

Upon the record thus made and from his observation of the witnesses, the undersigned makes, in addition to the above, the following specific findings of fact:

FINDINGS OF FACT

1. Respondent

1. The respondent is, and has been since 1865, a Texas corporation. Its principal office and place of business are in the City of San Antonio, State of Texas. Respondent owns and publishes two daily nawspapers in San Antonio, Texas, known as the San Antonio Express, a morning paper, and the San Antonio News, an evening paper. Frank G. Huntress is the president and manager of the respondent company; Thornton Hall is secretary and assistant to the president; A. W. Grant is managing editor of the San Antonio Express and M. M. Harris is chief editorial writer. A. W. Walliser is managing editor of the San Antonio News.

II. The Organization Involved

2. The San Antonio Newspaper Guild, affiliated with the Committee for Industrial Organization, through the American Newspaper Guild, is a labor organization, within the meaning of the Act, admitting to its membership all editorial, advertising, carrier, office, and circulation department employees of respondent.

III. The Unfair Labor Practices

A. Interference, restraint and coercion

3. The Guild was organized in 1936 among certain employees of all the newspapers published in San Antonio, Texas. On February 28, 1938, a contract was entered into between the Guild and the Light Publishing Company,

publishers of the San Antonio Light, the only competitor of respondent in San Antonio, Texas. This contract expires on March 7, 1939.

4. On April 4, 1938, the following statement was read by Thornton Hall, secretary and assistant to the president of respondent company, at a meeting of respondent's employees:

> We have called you to this meeting for the purpose of offering you further explanation and interpretation than perhaps you have received to date of a matter which vitally concerns each of you as well as ourselves. We have reference to the National Labor Relations Act, known as the Wagner Act. The first thought we wish to leave with you is this: Under the provisions of the Wagner Act an employees is not required to join a labor union, or to pay dues or assessments to any organization unless he chooses to do so of his own free will. Existing independent employment relations may be continued by the individual employee, or by employees as a group. In other words, while the Act provides employees with the right of self-organization, to form, join or assist labor organization and further povides employees with the right to bargain collectively through representation of their own choosing, the Act does not require nor force an employee to join any labor organization. The employee has the right to join or refuse to join any organization and is to be guided only by the dictates of his own free will. Whether the employee joins or refuses to join any organization will have no effect whatever on his employment..
>
> No one can compel you to join any organization and no one can prevent you from joining any organization.
>
> The second thought we wish to leave with you is this: An employer may hire or discharge or transfer

employees to any task he may see fit, discharge an employee in the interest of efficiency or even from personal animosity or sheer caprice, but employees cannot be discharged or hired for the purpose of influencing their right under this Act.

In other words, membership in any organization does not guarantee an employee that he cannot be discharged. He can be discharged just as readily if he has organization membership as he can if he does not have the membership. The only protection an employee has ever had or ever will have against discharge is to perform his work in a satisfactory manner and to conduct himself in accordance with the general rules and requirements of his employer.

The third thought we would like to leave with you is this: It has always been and always will be a policy of this company to provide as agreeable and comfortable working conditions as possible for our employees. Each of you has been in our employ a number of years and each of you know that we have always endeavored to make your association with us as pleasant as possible and that we have always been interested in your welfare. As an illustration, each of you know we carried you through the depression rather than throw you out of employment, although our business did not justify us in doing so. Further, you know that we have carried some of you through sickness. Further, each of you know that it is our policy to give each one a vacation with full pay. All of this is done because of our interest in your welfare and to promote pleasant relationship between you and our company. Each of you know we were not forced to do this by any labor organization and no labor organization can force us to do these things.

Summing up, an employee cannot be forced to join a labor organization but it is a matter of exercising

his own free will; membership in a labor organization does not guarantee an employee employment; and, membership in a labor organization does not guarantee an employee the interest in his welfare by his employer.

We intend to give every consideration to Guild members and we want it understood that non-Guild members will also receive every consideration.

We hope we have given you some beneficial information and we appreciate your coming here for this meeting.

5. The foregoing statement was read by Hall to the employees after he had attended the two meetings between respondent and representatives of the Guild, which occurred on March 14 and 30, 1938, respectively, also after Hall had conferred with Frank G. Huntress, president of the respondent company.

6. Hall testified that the reason why he prepared and read this statement was because the respondent had done certain things for its employees, and "others" were claiming the credit for them and he thought the respondent should have that credit. He further stated that: "When I said 'others,' I meant the other employees; some of the employees who had been making remarks
23 that in the event of organization of the Guild they could look forward to those things and we were already giving them to them."

7. It is quite apparent from the evidence that respondent caused the aforesaid statement to be read to its employees for the purpose of checking and discouraging the activities of the Guild in the plant.

8. By the activities herein above-described, the respondent has interfered with, restrained and coerced its

employees in the exercise of the rights guaranteed in Section 7 of the Act.

9. By said activities, respondent has discouraged membership in a labor organization known as the San Antonio Newspaper Guild.

B. The refusal to bargain with the Guild

1. The appropriate unit

10. It was stipulated and agreed by all parties in interest that all of the employees of respondent engaged in the editorial department of its two newspapers, namely, city editors, reporters, copy desk and rewrite men, artists, photographers, copy boys, librarians, society editors and writers, and sports editors and writers constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

11. The complaint alleges that the respondent on or about March 14, 1938, and thereafter, refused to bargain with the Guild as the representative of its employees comprising the aforesaid unit.

2. Majority representation

12. It was stipulated and agreed by all parties in interest that the aforesaid appropriate unit consists of a total of 42 employees of respondent, and that 31 of these employees were, on February 15, 1938, and thereafter, members of the Guild and had designated the Guild as their representative for the purpose of collective bargaining.

13. A majority of said employees within
24 said appropriate unit have designated the San Antonio Newspaper Guild as their representative for the purpose of collective bargaining with respond-

ent in respect to rates of pay, wages, hours of employment, and other conditions of employment. At all times since February 15, 1938, the San Antonio Newspaper Guild has been, by virtue of Section 9 (a) of said Act, the exclusive representative of all employees in the aforesaid unit for the purpose of collective bargaining with the respondent in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain in March 14, 1938, and thereafter

14. On March 1, 1938, the Guild wrote to respondent and stated that the editorial department employees of respondent's two newspapers had designated the Guild as their representative for purposes of collective bargaining with respondent, and the Guild had chosen Henry Dielman, a San Antonio attorney, Sidney Berkowitz, an employee of a San Antonio department store and Frank G. Ragsdale, president of the Guild, as its representatives for the purpose of negotiating a contract between the Guild and respondent, and requested respondent to set a time and place for the meeting. Also some of respondent's employees in the editorial department desired to attend the meeting as observers.

15. On March 8, 1938, the Guild wrote a similar letter to respondent. On March 10, respondent complied with the Guild's request and set March 14, as the date of the meeting in respondent's directors' room. The meeting was held as scheduled and Huntress, Walliser, Grant and Hall represented the respondent and Ragsdale, Berkowitz, and Dielman represented the Guild. Five of respondent's employees attended as observers.

16. The proceedings were taken down by T. H. Buyer, a court reporter. The Guild presented a proposed contract to Huntress, who accepted it and said it would be given due consideration. He further stated to the meeting that he was leaving the city and did

not know when he would return, therefore he could not set a date for another conference, but he would consider the contract and let them know the result later. The meeting then adjourned.

17. On March 25 respondent notified the Guild by letter that it would meet the representatives of the Guild on March 30 at the same place. The meeting was held and the proceedings were taken down by Henry L. Gazley, a court reporter. The same conferees as before were present, with the addition of M. M. Harris and Leroy Denman, attorney for respondent.

18. The proposed contract, which the Guild had presented to respondent at the meeting of March 14, contained various articles dealing with a Guild shop, preferential hiring, classifications of employees, minimum salaries, level increase in pay, hours, severance of employment, vacations, illness, limitation of apprentices, and miscellaneous provisions.

19. Huntress stated at the meeting that the contract had been considered and was found to be unreasonable and unacceptable to respondent. He further stated that the Guild shop, or closed shop, was contrary to the provisions of the National Labor Relations Act. Huntress characterized the entire contract as unreasonable, unwarranted, and unacceptable. It appears from the evidence that at that time respondent had entered into a closed-shop agreement with the Typographical Union. During this meeting, Huntress, president of respondent company, said, "As a matter of fact, we don't intend to have the Guild or any other union tell us how to run our editorial department. We have the right to run our business the way we think is best so that we can make it possible for the stockholders to receive something."

26 20. The Guild requested Huntress to submit counterproposals to the Guild as a basis for negotiation. Huntress refused to do so. The Guild also requested

him to go over each paragraph of the proposed contract with them in order that some tentative agreement could be reached as to just what kind of contract respondent would agree to. Huntress refused to do so, and stated that if the Guild desired to submit another contract to him, he would give it consideration. The representatives of the Guild finally stated that they would report the result of the meeting to the Guild members. No agreement was reached at that meeting and it adjourned.

21. On April 13, the Guild wrote to respondent and requested another conference. Respondent replied on April 16, and set April 21 as a suitable date for the meeting at the same place that the other two meetings had been held.

22. On April 13 the Guild circulated among its members a bulletin under the caption "San Antonio Guild Reporter, Vol. 1, No. 4" announcing a "Big Gridiron Dinner" to be held at the Gunter Hotel on April 28. A paragraph, captioned "Another Express-News Contract Confab Hits Wall," appeared in this bulletin which stated, inter alia, that representatives of the Guild had met with a rebuff at the second meeting with respondent on March 30 and that Mr. Huntress had termed the proposed contract, submitted at the previous meeting (March 14), as unreasonable and unacceptable and had refused to give any reasons therefor, and had also declined to outline what kind of a contract might be agreeable to him, etc.

23. On April 21 another meeting was held between respondent and representatives of the Guild at the same place that the previous meetings were held. The respondent was represented by Thornton Hall, M. M. Harris, and Leroy G. Denman, respondent's attorney. The Guild was represented by Frank G. Ragsdale and Henry B. Dielman and five Guild members as observers. The proceedings
27 of the meeting were recorded by T. H. Burger, court reporter.

24. Hall stated that Huntress was out of the city, but

they would hold the meeting. Dielman then read a lengthy statement, addressed to respondent by the Guild, and dated April 15. The statement referred to the failure to accomplish any results at the previous meetings and also respondent's rejection of the proposed contract as being unreasonable and unacceptable. It resubmitted the contract and requested respondent to go over it, item by item, with the Guild's representatives, thereby demonstrating to its employees its sincerity in the matter of collective bargaining. The statement went on to outline the position of the Guild in respect to the proposed contract and discussed the various provisions of same. In regard to the Guild shop or closed-shop provision of the contract, the Guild agreed to waive discussion on that until the other provisions had been agreed upon.

25. Hall then stated that they would accept a copy of the statement and send it to Huntress for his consideration while he was away and for further consideration upon his return to the city and he wanted this to be done before any further negotiations were had with reference to it. Harris then made an objection to the wording of the opening paragraph of the statement. He also made a long statement criticizing the Guild for issuing the aforesaid bulletin on April 13. The remainder of the meeting was taken up by various statements made by Dielman, Harris, and Denman. Nothing was accomplished at this meeting except that the Guild agreed to withdraw paragraph 20 of the aforesaid statement which was presented to this meeting by the Guild, for the reason that it had been misconstrued by respondent.

26. On May 16 the Guild asked respondent for another conference in regard to the statement delivered to respondent by the Guild at the meeting on April 21.

27. A meeting was arranged for May 23 at the same place that the other meetings were held. The re-

spondent was represented by Huntress, Harris, Grant, Walliser, Hall and Attorney Denman, also Frank G. Huntress, Jr. The Guild was represented by Ragsdale and Dielman. Burger acted as reporter and recorded the proceedings. Huntress still characterized the proposed contract as unreasonable and unacceptable and refused to submit counter proposals. Dielman stated that the proposed contract was submitted to respondent as a basis for negotiations only; however, Huntress refused to negotiate and requested the Guild to submit another contract. Nothing was accomplished at this meeting.

28. Efforts were made by the Guild to have another conference with respondent on or about August 4, but the meeting did not materialize, and further negotiations ceased, and on August 17 the Guild filed an amended charge against the respondent with the Regional Office.

29. On September 22 a formal complaint was issued against respondent by the Regional Director.

30. The San Antonio Newspaper Guild has attempted on March 14, 1938, and at various times thereafter, to bargain collectively with respondent, as exclusive representative of respondent's employees within the aforesaid appropriate unit in respect to rates of pay, wages, hours of employment, and other conditions of employment.

31. The respondent did, on March 14, 1938, and on subsequent dates, refuse to bargain collectively with San Antonio Newspaper Guild as exclusive representative of respondent's employees within the aforesaid appropriate unit, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

IV. Interstate Commerce

32. The respondent is engaged in the business of editing, publishing, and selling two daily newspapers in San

Antonio, Texas. It is a member of the Associated Press (herein referred to as A. P.) and purchases news items, both domestic and foreign from the A. P.
29 It also purchases such news from the United press (herein referred to as U. P.). It pays the A. P. $700 and the U. P. $200 a week for such news. Respondent furnishes A. P. with Texas news items. Respondent has a contract with a newspaper correspondent in Washington, D. C., from whom it purchases his writings in reference to current events. It pays him $2600 a year for this service. Respondent also purchases from sources outside of Texas, such as McClures, Chicago Tribune, and American Institute of Public Opinion, articles written by newspaper writers; also comics and cartoons for publication in its two newspapers. Each of respondent's newspapers publishes daily quotations from the New York Stock Exchange, also grain quotations on various markets in the United States, and cotton prices on the New Orleans and Memphis markets.

33. Respondent has an arrangement with John Budd & Co., which has offices in New York, Chicago, St. Louis, San Francisco, and other places, whereby it publishes advertisements for Budd & Co.'s clients located throughout the various States who wish to advertise in Texas. Budd & Co. pays respondent for the cost of these advertisements. These advertisers are engaged in selling and distributing their products in interstate commerce. The amount received by respondent from Budd & Co. for such advertising matter is approximately 21.8 per cent of its total revenue from that source and approximately 16 per cent of its total revenue from all sources. Respondent's total gross receipts, from all sources, amount to approximately one and one-half million dollars a year.

34. The combined circulation of both newspapers of respondent is approximately 98,000 copies daily, all of which is distributed in Texas, except a very small percentage.

35. Respondent purchases its blank paper for printing its newspapers from sources outside of the State of Texas. Annual purchases of this material amount to approximately 7,000 tons of paper, valued at about $300,000. Respondent uses about $13,500 worth of printers' ink a year, and approximately 20 per cent of this amount is purchased outside of Texas. Spare parts for respondent's presses and machinery are purchased outside of Texas, to the value of about $1,850 a year. Lead, used in casting type, to the value of approximately $1,600 a year, is purchased by respondent outside of Texas.

36. Respondent is an independent publisher and is not a part of any chain of newspapers. Respondent normally employs about 350 persons at its plant.

37. The activities of the respondent, set forth in Section III above, occurring in connection with the operations of respondent described in Section IV herein, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS AND RECOMMENDATIONS

Upon the basis of the foregoing finding of fact, the undersigned hereby determines and concludes that:

1. Respondent, by refusing to bargain collectively with San Antonio Newspaper Guild, and by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as set forth in the above findings of fact, has engaged in and is engaging in an unfair labor practice affecting commerce within the meaning of Section 8 (1) and Section 2 (6) and (7) of the National Labor Relations Act.

2. Respondent, by refusing to bargain collectively with San Antonio Newspaper Guild, as set forth in the above findings of fact, has engaged in and is engaging in an unfair labor practice affecting commerce within the meaning of Section 8 (5) and Section 2 (6) and (7) of the National Labor Relations Act.

31 WHEREFORE, the undersigned recommends that:

1. Respondent cease and desist from interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the San Antonio Newspaper Guild, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

2. Respondent cease and desist from discouraging membership in the San Antonio Newspaper Guild, or any other labor organization, by refusing to bargain collectively with San Antonio Newspaper Guild, the representative of the employees within the aforesaid appropriate unit, as hereinabove set forth.

3. In order to affectuate the policies of the Act, respondent take the following affirmative action:

(a) Upon request, bargain collectively with the San Antonio Newspaper Guild as the exclusive representative of the respondent's employees within the aforesaid unit, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places in its plant at San Antonio, Texas, and maintain for a period of at least thirty (30) consecutive days, notices to its employees stating that (1) respondent will cease and desist in the

manner aforesaid, and (2) respondent will, upon request, bargain with the San Antonio Newspaper Guild as exclusive representative of respondent employees within the aforesaid appropriate unit, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(c) File with the Regional Director for the Sixteenth Region on or before ten (10) days from the receipt of this Intermediate Report, a report in writing setting
32 forth in detail the manner and form in which it has complied with the foregoing requirements.

It is further recommended that, unless on or before ten (10) days from the receipt of the Intermediate Report the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the matter be referred forthwith to the National Labor Relations Board and that said Board issue an order requiring respondent to take the action aforesaid.

Request for the privilege of filing briefs with, or presenting oral argument before the National Labor Relations Board upon issues raised by any exceptions to this Intermediate Report or on other issues upon which it is desired to file a brief or present oral argument, must be made to the National Labor Relations Board, Shoreham Building, Washington, D. C., within ten (10) days from the receipt of this Report.

/s/ W. P. WEBB

Trial Examiner.

Dated: November 25, 1938.

33 File in Informal File

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH-REGION

Re EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD	Case No. XVI-C-293

EXCEPTIONS OF THE EXPRESS PUBLISHING COMPANY TO THE INTERMEDIATE REPORT

National Labor Relations Board

Dec 5 1939

Docketed D

DENMAN, FRANKLIN & DENMAN

Attorneys.

34 UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH-REGION

Re EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD	Case No. XVI-C-293

EXCEPTIONS OF THE EXPRESS PUBLISHING COMPANY TO THE INTERMEDIATE REPORT

Now comes the Express Publishing Company and presents the following exceptions to the Intermediate Report filed herein by the Trial Examiner dated November 25, 1938, served on the Respondent November 29, 1938, said exceptions being as follows:

1. Excepts to the action of the Examiner in overruling the objections to the jurisdiction of the Board set out in Paragraphs A, B and C of Respondent's answer.

2. Excepts to the overruling by the Examiner of the Motion to dismiss, strike out or require an amendment of the Complaint as set out in Paragraph D of Respondent's answer.

3. Excepts to the overruling by the Examiner of the Motion to dismiss, strike out or require an amendment of the Complaint as set out in Paragraph E of Respondent's answer.

35 4. Excepts to the overruling by the Examiner of the Motion to dismiss, strike out or require an amendment of the Complaint as set out in Paragraph F of Respondent's answer.

5. Excepts to Paragraphs 6, 7, 9 and 11 of the Complaint and the intermediate report based thereon because the said Complaint does not charge a violation of the National Labor Relations Act, in that it charges only that Respondent "refused to agree to any request made by the Union and refused to offer any character of counter proposal" and the Wagner Act does not require the Respondent to agree to the Union's proposal or to make a counter proposal.

6. Excepts to the Complaint and the intermediate report based thereon, in that the Complaint limits and defines its charge of refusal to bargain collectively to a refusal to agree to the Union's proposal and a refusal to offer a counter proposal and the same therefore charges no violation of the law, because the Respondent under the Constitution cannot be required to make an agreement.

7. Excepts to Paragraphs 8, 9 and 11 and the intermediate report based thereon, in that the making of the statement referred to does not constitute a violation of the Wagner Act.

8. Excepts to Paragraphs 8, 9 and 11 of the Intermediate report based thereon, in that the making of such statement was a proper exercise of the freedom of speech guaranteed by the Constitution and does not violate the Wagner Act.

9. Excepts to the Examiner's refusal to sustain the Respondent's Motion to strike out or amend by the averment of particulars the language contained in Paragraph 9 of the Complaint charging the Respondent with
36 interfering with, restraining and coercing its employees by various and sundry other means well known to Respondent, in that it was not due process of law

to require the Respondent to go to trial upon such allegation without apprising Respondent in the complaint of the nature of the charge against Respondent and the said Complaint and the trial based thereon and the Examiner's Report based thereon do not comply with the fundamental requirements of a fair trial.

10. Excepts to the finding in Paragraph 7 of the intermediate report that Respondent caused Hall's statement to be read to its employees for the purpose of coercing and discouraging the activities of the Guild, in that there is no evidence to support said finding.

11. Excepts to the finding in Paragraph 7 of the intermediate report that Respondent caused Hall's statement to be read to its employees for the purpose of coerting and discouraging the activities of the Guild in that there is insufficient evidence to support such finding.

12. Excepts to the finding of Paragraph 8 of the intermediate report to the effect that by the activities therein referred to Respondent has interfered with, restrained and coerced its employees in that there is insufficient evidence to support said finding.

13. Excepts to the finding of Paragraph 8 of the intermediate report to the effect that by the activities therein referred to Respondent has interfered with, restrained and coerced its employees in that there is insufficient evidence to support said finding.

14. Excepts to the finding of Paragraph 9 of the intermediate report to the effect that by said activi-
37 ties the Respondent has discouraged membership in the San Antonio Newspaper Guild, in that there is no evidence to support said findings.

15. Excepts to the finding of Paragraph 9 of the intermediate report to the effect that by said activities the Re-

spondent has discouraged membership in the San Antonio Newspaper Guild, in that there is insufficient evidence to support said finding.

16. Excepts to the findings in the intermediate report to the effect that the statement read by Hall constituted a violation of the Wagner Act, because there was no evidence that the statement had any effect on any of the employees to coerce, interfere with, restrain or affect them in any manner.

17. Excepts to the finding in Paragraph 20 to the effect that Huntress refused to submit a counter proposition to the Guild as a basis for negotiating, because there is no evidence to support such finding.

18. Excepts to the finding of Paragraph 20 of the report that Huntress refused to go over each paragraph of the proposal with the Guild's representatives, in that the finding is not supported by the evidence.

19. Excepts to the finding in Paragraph 27 of the report that Huntress refused to submit a counter propcsal, in that it is not supported by the evidence.

20. Excepts to the finding in Paragraph 27 of the report that Huntress refused to negotiate, in that it is not supported by the evidence, it being shown by the evidence that he did negotiate but that the parties did not arrive at an agreeemnt.

38 21. Excepts to the finding in Paragraph 28 to the effect that efforts were made by the Guild to have another conference with Respondent on or about August 4th, because it is shown by the stipulation of the parties introduced in evidence that the meeting of August 4th was not called in accordance with efforts of the Guild or of Respondent but by LeBarron, a representative of the Labor Board and that the meeting was called off by him

and that neither the Guild nor Respondent called the meeting and that Respondent was willing to meet if the Guild wanted to meet.

22. Excepts to the finding in Paragraph 31 to the effect that Respondent refused to bargain collectively with the Guild, because the evidence shows that Respondent did not refuse to do so but in fact did bargain collectively with the Guild as the representative of said employees.

23. Excepts to the finding contained in Paragraph 37 to the effect that the activities of Respondent referred to therein have a close, intimate and substantial relation to Inter-state Commerce and tend to burden and obstruct Inter-state Commerce and the free flow thereof, in that it is shown by the evidence that the same do not have any substantial connection with and do not obstruct inter-state Commerce or the free flow thereof, and said finding is not supported by the evidence.

24. Excepts to the conclusions and recommendations in said report on each of the grounds hereinabove set out in the foregoing exceptions.

39 25. Excepts to the findings in said report of violation of the Wagner Act on the ground that such findings are not limited to the matters complained of in the Complaint, in that the Complaint charged merely that by Hall's statement Respondent had the effect of discouraging membership and that Respondent had refused to agree to any request made by the Union and refused to offer a counter proposal, whereas the report undertakes to find that Respondent refused to bargain collectively, and also that Respondent did in fact coerce, interfere with and restrain its employees from the exercise of the rights guaranteed to them by the Act and discouraged membership in the Guild so that the report undertakes to find the Respondent guilty of violations of the Act not charged by the Complaint.

26. Excepts to the said findings and recommendations on the ground that they recommend among other things injunction against Respondent in reference to "any other labor organization" when there was no complaint involving any other labor organization and it would not be due process to thus adjudicate in reference to some other labor organization without specifying it or some proof that it is lawfully organized and entitled to the relief thus granted.

27. Further excepts to the affirmative action recommended to the effect that Respondent be ordered to bargain collectively upon request when the evidence shows that it has been bargaining collectively with the Guild and that it has outstanding tenders and offers to continue to bargain collectively and that negotiations were broken off by the Guild and not by the Respondent.

28. Further excepts to the recommendation in reference to requiring Respondent to post notices that it will cease and desist from interfering with, restraining or coercing its employees, etc., in that Respondent denies that it has ever done so, and therefore said requirement which in effect requires Respondent to sign an admission that it has been guilty of such practices and will now cease them, would be a violation and infringement upon the liberty of speech guaranteed by the amendment to the Constitution of the United States since liberty of speech includes freedom to be silent as well as to speak, and also violates the provisions guaranteeing due process of law, the Amendments referred to herein being among others the First and Fourteenth Amendments to said Constitution, and the said requirement exceeds the power vested in the Labor Board which did not include the power to extort or require "confessions", especially where the party is denying the truth thereof.

29. Excepts to the conclusions and recommendations, in that it appears from the entire proceedings, both the com-

plaint and the evidence, that the Respondent bargained collectively with the Guild as the representative of its employees in the Unit in full accord with the Act and that the Complaint was merely that the Respondent did not reach an agreement with the Guild and therefore there was no violation of the Act since the Act requires only to bargain and not that the parties reach an agreement.

41 Respectfully submitted,

EXPRESS PUBLISHING COMPANY

DENMAN FRANKLIN DENMAN

By LEROY G. DENMAN

Its Attorney,

215 W. Commerce Street

San Antonio

Texas.

42 COPY

DENMAN, FRANKLIN & DENMAN

LAWYERS

OFFICES IN SAN ANTONIO LOAN AND

TRUST BUILDING

SAN ANTONIO, TEXAS

November 30, 1938

Re: Express Publishing Company

and

San Antonio Newspaper Guild. Case No. XVIC-293

National Labor Relations Board,

Washington,

D. C.

Gentlemen:

Receipt is acknowledged of the copy of the Intermediate Report filed by the Trial Examiner. Enclosed are the Exceptions of the Express Publishing Company (4 copies).

In accordance with your letter, we hereby request that we be permitted to submit oral argument before the Board.

Yours truly

s/ DENMAN FRANKLIN DENMAN

for Express Publishing Co.

LGD-k.

encs.

43 NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D. C. NLRB 122a

National Labor Relations Board

Mar 10, 1939

Docketed M

In the Matter of EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD	Case No. C-1071

NOTICE OF HEARING

PLEASE TAKE NOTICE that pursuant to authority vested in the National Labor Relations Board under an Act of Congress (49 Stat. 449) a hearing will be held before the National Labor Relations Board on Tuesday, March 21, 1939 at 2:00 p. m. or as soon thereafter as the Board may hear you, in Room 326, Shoreham Building, Fifteenth and H. Streets, N. W., Washington, D. C., for the purpose of oral argument in the above entitled matter. Argument will be limited to one-half hour for each party, and you are hereby advised that in view of the Board's docket no request for additional time made at the hearing will be granted.

You may appear and be heard if you so desire.

Dated, Washington, D. C., March 10, 1939.

NATHAN WITT

(Seal) Secretary

44 Z-218

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of EXPRESS PUBLISHING COMPANY and SAN ANTONIO NEWSPAPER GUILD	Case No. C-1071

Room 442
Shoreham Building
Washington, D. C.

A hearing was held in the above matter for the purpose of ORAL ARGUMENT at the above place on March 21, 1939 at 2:00 p. m.

BEFORE:

J. Warren Madden, Chairman
Edwin S. Smith, Member
Donald Wakefield Smith, Member

APPEARANCES:

Edwin Swope, of Counsel to the Board
For the Company:
L. G. Denman,
San Antonio, Texas
For the Union:

45 UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of Express Publishing Company and San Antonio Newspaper Guild

Case No. C-1071.—Decided July 28, 1939

Newspaper Industry—Interference, Restraint, or Coercion: misrepresenting terms and purposes of the Act to employees—Unit Appropriate for Collective Bargaining: city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers employed by respondent in the editorial departments of both its newspapers; stipulation as to—Representatives; stipulations as to—Collective Bargaining: meaning of; negotiations in good faith; meeting with representatives but with no bona fide intent to reach an agreement; counter-proposals, failure or refusal to make.

Mr. L. N. D. Wells, Jr., for the Board.

Mr. Leroy G. Denman, of San Antonio, Tex., for the respondent.

Mr. Frank G. Ragsdale, of San Antonio, Tex., for the Guild.

Mr. Edwin L. Swope, of counsel to the Board.

DECISION

and

ORDER

Statement of the Case

Upon charges and amended charges duly filed by San Antonio Newspaper Guild, herein called the Guild, the Na-

tional Labor Relations Board, herein called the Board, by the Regional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated September 22, 1938, against Express Publishing Company, San Antonio, Texas, herein called the respondent, alleging that the respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint, accompanied by notice of hearing, was duly served upon the respondent and the Guild.

The complaint alleged in substance that the respondent had made certain statements to its employees for the purpose of discouraging membership in the Guild and had refused to bargain collectively with the Guild as the exclusive representative of its employees in an appropriate unit although the Guild had been designated by a ma-
46 jority of such employees as their representative for the purpose of collective bargaining. On October 3, 1938, the respondent filed its answer, denying that it had engaged in the unfair labor practices alleged in the complaint and denying that its business affects commerce within the meaning of the Act.

Pursuant to notice, a hearing was held at San Antonio, Texas, on October 6, 1938, before William P. Webb, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and the Guild by its president and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. During the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Trial Examiner reserved decision on certain other rulings for his Intermediate Report.

On October 18, 1938, the respondent filed a brief with the Trial Examiner in support of its case. On November 25, 1938, the Trial Examiner filed his Intermediate Report, finding that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act, and recommending that the respondent cease and desist therefrom and take certain specified affirmative action. The Trial Examiner also made rulings on motions upon which he had reserved decision during the hearing. The Board has reviewed these rulings and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On December 5, 1938, the respondent filed Exceptions to the Intermediate Report. On March 21, 1939, pursuant to notice, a hearing for the purposes of oral argument on the Exceptions and on the record was held before the Board in Washington, D. C. The respondent was represented by counsel and participated in the argument. The Guild did not appear. The Board has considered the respondent's Exceptions and finds no merit in them.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. The Business of the Respondent

The respondent is a Texas corporation engaged in the publication of the San Antonio Express and the San Antonio News, daily morning and evening newspapers respectively, in the City of San Antonio, Texas. The average combined daily circulation of these newspapers is in excess of 90,000, practically all of which is confined to the State of Texas. The respondent's newspapers carry news of local, national, and foreign affairs, local and national advertising, special

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features, cartoons, and comic strips. Out-of-state news is supplied by the United Press, to which the respondent is a subscriber, and by the Associated Press, of which the respondent is a member. The news dispatches are delivered by these organizations to the respondent's place of business by means of their facilities and employees located in the respondent's building. Local news of importance which is gathered by the respondent's reporters is sent out daily by the local representative of the Associated Press. The respondent also has an arrangement with a newspaper correspondent in Washington, D. C., who transmits to the respondent news items from Washington. The National advertising carried by the respondent's newspapers and procured for it by an agent having offices in New York, Chicago, St. Louis, Dallas, San Francisco, and Los Angeles accounts for approximately 16 per cent of the respondent's total income, or about $225,000.

Approximately 35 per cent of the respondent's total expenses are incurred in the purchase of goods and services originating outside the State of Texas. The cost of special features and the Associated Press and United Press services in 1937 amounted to about $80,633. The respondent purchases all of its newsprint and lead outside the State at a yearly cost of $295,600. It also annually purchases outside of the State about $2,900 worth of ink and $1,850 worth of parts used in maintaining and repairing its machinery. These raw materials are shipped to the respondent from points outside the State of Texas.

II. The Organization Involved

San Antonio Newspaper Guild is a labor organization affiliated with the American Newspaper Guild, which is in turn affiliated with the Committee for Industrial Organization. The Guild admits to its membership editorial, advertising, carrier, office, and circulation department employees of the newspapers located in San Antonio, Texas.

III. The Unfair Labor Practices

A. The refusal to bargain collectively

1. The appropriate unit

It was stipulated by the parties that "all the employees of respondent engaged in the editorial department, both of the NEWS and EXPRESS, namely, city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act."

We find that the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers employed by the respondent in the editorial departments of the San Antonio News and the San Antonio Express constitute a unit appropriate for the purposes of collective bargaining and that said unit insures to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Guild of a majority in the appropriate unit

It was further stipulated by the parties that at all times referred to in the complaint the Guild was the representative of a majority of the employees of the respondent in the appropriate unit for collective bargaining purposes.

We find that on February 15, 1938, the Guild had been designated and selected by a majority of the employees in the appropriate unit as their representative for the pur-

poses of collective bargaining, and that pursuant to Section 9 (a) of the Act, was on that date and at all times thereafter the exclusive representative of all the employees in such unit for the purposes of collective bargaining with the respondent in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain; interference, restraint, and coercion

On March 14, 1938, after the Guild had twice requested the respondent to enter into negotiations with it, the first conference between the representatives of the Guild and the respondent was held. At this conference the Guild was represented by Frank G. Ragsdale, president of the Guild, Sidney Berkowitz, an employee of a San Antonio department store, and Henry Dielmann, attorney. The respondent was represented by Frank G. Huntress, president of the respondent, Thornton Hall, secretary of the respondent, and A. W. Walliser and A. W. Grant, also officials of the respondent.

Dielmann opened the conference by stating that the Guild had given its representatives a proposed contract which it desired to be used as a basis of negotiation between its representatives and those of the respondent.[1] Huntress then read a prepared statement to the effect that the respondent had always maintained a just and impartial relationship with its editorial department employees regardless of union affiliation, and that it intended to continue this policy. He also described generally certain benefits which he claimed the respondent had given its employees since 1902. At the conclusion of his statement Huntress announced "While we see no reason to change our just and impartial policy in the news and editorial departments of our newspapers which has been maintained up to the pres-

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1 The minutes of this conference as well as those that followed were transcribed and appear in evidence as Board Exhibit 3 E, H, O, and U.

ent time, every consideration will be given to the Guild members and any other employee in those departments of our newspapers."

The Guild representatives then presented the written draft of the proposed contract which contained various provisions for (1) the establishment of a "Guild Shop";[2] (2) preferential hiring of Guild candidates to fill vacancies; (3) the classifications of employees; (4) minimum salaries; (5) at least a 10-per cent increase in pay to all employees; (6) an 8-hour day and a 40-hour week with time and one-half pay for overtime; (7) written notice to discharged employees stating cause therefor and a cash severance payment equal to 4 weeks' pay; (8) vacations with pay; (9) sick leave with pay; and (10) limitations on the employment of apprentices. The proposed contract also provided inter alia that (1) employees be reimbursed for expenses incurred in line of duty; (2) the respondent would not enter into any agreement with any other publisher not to offer to give employment to any employees of the publisher; (3) neither reporters should be required to act as photographers nor photographers as reporters; (4) bulletin board space would be made available for Guild notices; and (5) no employee would be required to publish under his name any material containing an expression of opinion not in conformity with his opinion.

Ragsdale then set forth the general aim of the Guild and stated that the Guild representatives "would like to sit down around a table and discuss these things [provisions of the contract] and see why they are necessary and why we want them, and why we think we ought to have them. That is one of the reasons why I would like to see us sit

2 The provisions in the proposed contract for a "Guild Shop" read as follows:

1. The Publisher shall require as a condition of employment of any employee that he be and remain a member of the Guild in good standing during the term of his employment. If any employee be not a member of the Guild at the time of signing of this agreement or at the time of his acceptance of employment, he shall become a member of the Guild within thirty days of the date of signature of this agreement or within thirty days of his becoming an employee of the Publisher.

8. The Guild agrees that it will admit to membership and retain in membership any employee, subject to the Constitution of the American Newspaper Guild and bylaws of the Guild.

down and take this thing [contract] up clause by clause and see what it means to us, as well as what it means to you."

50 Huntress agreed to consider the proposed contract and to notify the Guild as soon as possible, and the meeting adjourned.

On March 30, 1938, a second conference was held. Huntress opened the meeting by reading the following prepared statement:

> We have thoroughly considered the provisions of the contract submitted to us by the negotiators in behalf of San Antonio Newspaper Guild on March 14, 1938. We find the terms of this proposed contract unreasonable and unacceptable.
>
> The proposed requirement that the publisher set up and maintain a "Guild Shop" with employment conditioned upon the applicant's Guild membership is contrary to the letter and intent of the National Labor Relations Act. That statute provides that an employee is not required to join a labor union, or to pay dues or assessments, to any organization, unless he chooses to do so of his own free will. Existing independent employment relations may be continued by the individual employee, or by employees as a group.
>
> The proposed contract calls for unreasonable restrictions upon the publisher's right of both employment and discharge in the conduct of the news department. It also would undertake to tie the publisher's hands as regards salary scales in relation to the condition and conduct of business. Furthermore, in several instances it would require pay for employees, without working.
>
> The proposed requirement of written notice stating cause of an employee's dismissal from the publisher's

employ is contrary to rights accorded by the Texas Constitution, as decided by the Supreme Court of this State. The proposed provisions as to sick leave and pay therewith are unreasonable on several grounds, and particularly in consideration of the fact that Texas law requires an employer to carry employee-compensation insurance, and that Federal law requires the employer to pay social security tax, so that he cannot afford to bear this obligation personally.

The proposed restrictions upon the nature and character of services to be rendered by photographers and reporters are unreasonable and unwarranted.

The proposed restriction upon the source and authorship of news and feature matter for these newspapers is utterly unreasonable and impracticable upon its face. Certainly no publisher should consent to any such censorship from any source.

The classifications proposed to employees in the application of the contract are unreasonable, unwarranted and unacceptable to the Company.

51 A discussion of the "Guild Shop" provision ensued during which Ragsdale, referring to the fact that prior to this time the respondent had entered into a closed-shop agreement with the representatives of certain of its employees not in the editorial department, asked Huntress why he desired to follow one procedure with regard to those employees and another with regard to its editorial department employees. Huntress replied; "As a matter of fact, we don't intend to have the Guild or any other union tell us how to run our Editorial Department. We have the right to run our business the way we think is best so that we can make it possible for the stockholders to receive something." After some argument Dielmann sought to discuss further the "Guild Shop" provisions, to which Huntress replied, "I think, as I said before, I have made it plain that the contract submitted was unreason-

able, unwarranted and unacceptable to us." He stated that the Guild could submit another contract if it so desired. Ragsdale then stated, "Mr. Huntress, we have only taken up this first clause and apparently are not getting anywhere on that. The Guild has submitted a proposition which it feels is a fair contract. As I stated at the last conference, the Guild is not trying to put anybody on the spot, but is perfectly willing to listen to reason." Ragsdale then asked, "Would you be willing to submit a counter proposition?" to which Huntress replied, "I think it is up to you all to submit a contract if you so desire." Dielmann then suggested that they discuss the various provisions of the proposed contract in order that a tentative agreement could be reached. He added that the manner in which the respondent's objections to the proposed contract were worded was such that the Guild representatives had no way "of finding out what paragraphs are acceptable or what changes would make them acceptable," and that they were therefore at a loss to know what type of a contract would be acceptable to the respondent. Huntress replied that he did not have anything further to say. During the ensuing discussion the Guild representatives repeatedly urged the respondent's representatives to go over each clause in the proposed contract with them in order that a tentative agreement could be drawn up but Huntress refused to change his position. The respondent's representatives reverted to the objections stated in the proposed statement read by Huntress at the beginning of the meeting and the conference terminated soon thereafter.

On April 4, 1938, the respondent's secretary with the permission of its president, assembled the editorial department employees and read the following statement:

> We have called you to this meeting for the purpose of offering you further explanation and interpretation than perhaps you have received to date of a
> 52 matter which vitally concerns each of you as well as ourselves. We have reference to the National Labor Relations Act, known as the Wagner

Act. The first thought we wish to leave with you is this: Under the provisions of the Wagner Act an employee is not required to join a labor union, or to pay dues or assessments to any organization unless he chooses to do so of his own free will. Existing independent employment relations may be continued by the individual employee, or by employees as a group. In other words, while the Act provides employees with the right to self-organization, to form, join or assist labor organization and further provides employees with the right to bargain collectively through representation of their own choosing, the Act does not require nor force an employee to join any labor organization. The employee has the right to join or refuse to join any organization and is to be guided only by the dictates of his own free will. Whether the employee joins or refuses to join any organization will have no effect whatever on his employment.

No one can compel you to join any organization and no one can prevent you from joining any organization.

The second thought we wish to leave with you is this: An employer may hire or discharge or transfer employees to any task he may see fit, discharge an employee in the interest of efficiency or even from personal animosity or sheer caprice, but employees cannot be discharged or hired for the purpose of influencing their right under this Act.

In other words, membership in any organization does not guarantee an employee that he cannot be discharged. He can be discharged just as readily if he has organization membership as he can if he does not have the membership. The only protection an employee has ever had or ever will have against discharge is to perform his work in a satisfactory manner and to conduct himself in accordance with the general rules and requirements of his employer.

The third thought we would like to leave with you is this: It has always been and always will be a policy of this company to provide as agreeable and comfortable working conditions as possible for our employees. Each of you has been in our employ a number of years and each of you know that we have always endeavored to make your association with us as pleasant as possible and that we have always been interested in your welfare. As an illustration, each of you know we carried you through the depression rather than throw you out of employment, although our business did not justify us in doing so. Further, you know that we have carried some of you through sickness. Further, each of you know that it is our policy to
53 give each one a vacation with full pay. All this is done because of our interest in your welfare and to promote pleasant relationship between you and our company. Each of you know we were not forced to do this by any labor organization and no labor organization can force us to do these things.

Summing up, an employee cannot be forced to join a labor organization but it is a matter of exercising his own free will; membership in a labor organization does not guarantee an employee' employment; and, membership in a labor organization does not guarantee an employee the interest in his welfare by his employer.

We intend to give every consideration to Guild members and we want it understood that non-Guild members will also receive every consideration.

We hope we have given you some beneficial information and we appreciate your coming here for this meeting.

On April 21, 1938, the third conference was held with Huntress absent. Ragsdale opened the conference by read-

ing a lengthy letter addressed to the respondent by the Guild in which the Guild stated that the respondent had rejected the proposed contract as unreasonable and unacceptable even as a basis of negotiations, and requested the respondent "to go over the previously proposed contract with our negotiators, item by item, thereby demonstrating to his employes his sincerity in collective bargaining." The letter also set forth the general policy and aims of the Guild and a lengthy reply to the respondent's objections to the proposed contract. The Guild offered to set aside the "Guild Shop" provision in the contract, which the respondent objected to, until the other provisions were discussed and pleaded "that negotiations be continued in a friendly spirit until the contract is thoroughly discussed, with the end in view that a contract mutually acceptable to the publisher and to the Guild will ultimately result." Hall accepted the letter, promised to give it to Huntress for his consideration and after some discussion during which Denman reiterated the objections stated in the prepared statement read by Huntress at the beginning of the March 30 conference and quoted in full above, the meeting adjourned.

On May 23, 1938, the fourth conference was held at the request of the Guild. The meeting was opened by Hall who read a statement prepared by Huntress which reiterated the respondent's former position that the contract was "unreasonable and unacceptable." The respondent's attitude appeared in the following conversations engaged in by Dielmann, Denman, and Huntress during this conference:

> Mr. Dielmann. The original contract as proposed has been rejected as being unsatisfactory and un-
> 54 acceptable. The Guild comes back and discusses the various objections in this communication, inviting an open discussion on those disputed questions regarding the original contract. What I want to know is, the negotiators here either can or either cannot discuss the objections made by the Publisher and the reply made by the Guild, one or the

other. In other words, are we at the end of what we can do? What is the next step for us as negotiators?

Mr. Denman. You are free to discuss anything you wish, or say anything you want to say. Discussion means something said by somebody. Now, Mr. Huntress has said item by item what his objections were to the contract, and anything you want to say I am sure Mr. Huntress will be glad to hear.

Mr. Huntress. You cannot reasonably expect us to continue this resultless discussion when you insist upon keeping that contract before us which has already been rejected as unreasonable and unacceptable. You have not given us anything to go by. All you say here is that you want us to discuss it. In other words, conversation based upon such an attitude can get us nowhere.

Mr. Dielmann. Well, all we can do is to take some proposal as the basis of discussion, even though it may on its face be unacceptable to you, yet it may be the basis of a discussion. In other words, you say here that a certain wage is an unreasonable wage and you do not accept that. Now, the only way we can find out what a reasonable wage is, according to your interpretation, is to discuss that wage or that particular classification. Now, I am merely inquiring as a negotiator whether we can do that, or is it your idea that we must submit to you an entirely new contract for your approval or disapproval.

Mr. Huntress. That is a matter entirely with the Guild. If you will look through the conversations that we have had so far you will find that you have at no time made it plain to us, other than submitting and resubmitting a proposed contract that we rejected.

Mr. Dielmann. Merely as a basis of discussion.

Mr. Huntress. I think we have made our objections to that contract very clear to you in writing.

Mr. Dielmann. Well, the Guild has answered your objections and there is, of course, a difference of opinion between the two of you. Our only purpose here is to see whether or not we can act as mediators between the Guild and you as the Publisher, in trying to arrive at what would be the basis of a fair contract to both.

55 The Guild representatives then urged the respondent's representatives "to sit around a table and take that contract which you have rejected and discuss it, and see if we can arrive at what ought to be eliminated and what might be acceptable, what rates might be considered reasonable by you." The respondent's representatives, however, refused to respond to this proposal. Finally, a Guild representative stated in effect that apparently further attempts to negotiate would be futile because of Huntress' attitude and the meeting ended.

A conference scheduled for August 4 failed to materialize because of a misunderstanding as to who had requested the meeting.

B. Conclusions

From the foregoing facts and upon the entire record, it is apparent that on March 14, 1938, and at all times thereafter, the respondent had no intention of negotiating in good faith with the Guild nor of entering into a collective bargaining agreement with it.

"Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement by the employer with the accredited representatives of its employees touching wages, hours of service, and other working conditions of the employees. The duty to bargain collectively, which the Act imposes upon employers, has as its objective the establishment of such a contractual relationship. We have held that this duty is

not limited to recognition of the employees' representatives qua representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented, to make contractually binding the understanding upon terms that are reached, and, under ordinary circumstances, to reduce that obligation to the form of a signed written agreement if requested to do so by the employees' representative."[3] Although the respondent was willing to meet with the Guild representatives and to receive the Guild's proposals, its objections to the proposed contract with the Guild submitted as a basis of negotiations amounted to nothing more than a flat rejection of the entire proposal and, like the statements of its representatives at all the conferences, were worded in such a manner that the respondent carefully avoided any affirmative indication of possible terms upon which it would be willing to agree. The Guild's representatives repeatedly requested and urged the respondent's representatives tc discuss each of the provisions in the proposed contract with them so that an understanding could be reached on each provision and a tentative agreement acceptable to both parties drawn up. However, Huntress, who was the spokesman for the respondent, would at no time change his position that the entire contract was "unreasonable and unacceptable"; that he was unwilling to submit a counter proposition; and that it was incumbent upon the Guild to submit another proposal, for his "due consideration," if the Guild cared to do so. Clearly an employer is not required under the Act to agree to whatever proposals a labor organization submits to him. It is obvious, however, that the technique employed by the respondent in this case was calculated to and did make any productive negotiations impossible.

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The respondent's action in assembling its editorial department employees on April 4 and reading the statement

3 Matter of Highland Park Manufacturing Co. and Textile Workers Organizing Committee, 12 N. L. R. B., No. 120; see also Matter of S. L. Allen & Company, Inc., a Corporation, and Federal Labor Union Local No. 18526, 1 N. L. R. B. 714.

set forth above amounted to a direct interference with the Guild's efforts to negotiate and constituted an invasion of the employees' rights under the Act. The statement which purported to inform the employees of their rights under the Act emphasized the fact that the employees were not required to avail themselves of such rights, that the existing labor policy was satisfactory to the respondent, that the benefits accorded to the employees flowed solely from the respondent's interest in their welfare, and that collective bargaining was in effect unnecessary. It is apparent that the statement which in no part described the purposes and policies of the Act presented a distorted concept of employees' rights thereunder.[4]

Counsel for the respondent contended at the oral argument that Huntress, by making clear during the conferences that he desired the then existing working conditions in the editorial department to continue, in effect had submitted a counter proposal. We find this contention to be without merit. Huntress did not at any time during the conferences affirmatively offer or indicate that he was willing to enter into an agreement of any kind with the Guild.

An employer's tactics in evading his obligation to bargain collectively under the Act similarly appeared in Matter of Globe Cotton Mills and Textile Workers Organizing Committee[5] in which we said:

> The respondent's tactics in readily participating in discussions in which its agents carefully avoided any semblance of agreement to proposed terms and offered no suggestions for changes
> 57 acceptable to them convince us that the respondent only sought to give the appearance of obedience to the Act without entering into genuine collective bargaining.

4 Cf. Matter of Mansfield Mills, Inc. and Textile Workers Organizing Committee, 3 N. L. R. B. 901; Matter of Mock-Judson Voehringer Company of North Carolina, Incorporated and American Federation of Hosiery Workers, North Carolina District, 8 N. L. R. B. 133; Matter of Titmus Optical Company and Optical Workers Union, Local No. 20682, 9 N. L. R. B. 1026.

5 6 N. L. R. B. 461.

In sustaining the Board's decision ordering the employer therein to bargain collectively with the representative of its employees, the Circuit Court of Appeals for the Fifth Circuit said:[6]

> We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for adjustment of grievances. . . . the duty is on the Mills [employer] to join in formulating one [a contract] to which both [the Union and the Employer] can agree, fixing as definitely as possible, and for such time as may be agreed on, wages, hours, and conditions of employment, whether on the present basis or a new one. . . . when a counter-proposal is directly asked for, [by the Union] it ought to be made [by the employer] for the resistance in discussion may have been only strategy and not a fixed final intention.

We find that the respondent at all times since March 14, 1938, has refused to bargain collectively with the Guild as the exclusive representative of its employees in an appropriate unit and that it has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. We further find that the respondent by reading the above-described statement to its employees on April 4, 1938, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

We find that the activities of the respondent set forth in Section III above, occurring in connection with the

6 Globe Cotton Mills v. National Labor Relations Board, 103 F. (2d) 91.

operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the respondent refused to bargain collectively with the Guild, we shall order it, upon request, to bargain collectively with the Guild as the exclusive representative of the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers employed by the respondent in the editorial departments of the San Antonio News and the San Antonio Express, and if understandings are reached, to embody such understandings in a signed agreement, if requested to do so by the Guild.

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We shall further order the respondent to cease and desist from its unfair labor practices.

Upon the basis of the foregoing findings of fact, the Board makes the following:

Conclusions of Law

1. San Antonio Newspaper Guild is a labor organization within the meaning of Section 2 (5) of the Act.

2. The city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers, employed by the respondent in the editorial departments of the San Antonio News and the San Antonio Express constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. San Antonio Newspaper Guild was on February 15,

1938, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

4. By refusing and continuing to refuse to bargain collectively with San Antonio Newspaper Guild as the exclusive representative of the employees in the above stated unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Express Publishing Company, San Antonio, Texas, and its officers, agents, successors, and assigns, shall:

59 1. Cease and desist from:

(a) Refusing to bargaining collectively wit i San Antonio Newspaper Guild as the exclusive representative of the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers in the editorial departments of both the San Antonio Express and San Antonio News;

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with the San Antonio Newspaper Guild as the exclusive representative of the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers in the editorial departments of both the San Antonio Express and San Antonio News, with respect to rates of pay, hours of employment, and other conditions of employment, and if an understanding is reached on any such matters, embody said understanding in a signed agreement, if requested to do so by the Guild;

(b) Post immediately notices to its employees in conspicuous places within the plant, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting; stating (1) that respondent will cease and desist as aforesaid, and (2) that the respondent will bargain collectively with San Antonio Newspaper Guild as the representative of its city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys and librarians, society editors and writers, and sports editors and writers, in the editorial departments of the San Antonio News and San Antonio Express, with respect to rates of pay, hours of employment, and other conditions of employment, and that if an understanding is reached on any such matters the respondent will embody said understanding in a signed agreement, if requested to do so by the Guild;

(c) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

Mr. William M. Leiserson took no part in the consideration of the above Decision and Order.

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File in Informal File

In the Matter of

EXPRESS PUBLISHING COMPANY

and

SAN ANTONIO NEWSPAPER GUILD

Case No. C-1071

National Labor Relations Board

Jul 28 1939

Docketed S

AFFIDAVIT AS TO SERVICE

DISTRICT OF COLUMBIA, ss:

I, C. Matthew Pientka being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 28th day of July 1939, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision and Order to the following named persons, addressed to them at the following addresses:

San Antonio Newspaper Guild

Att: Frank G. Ragsdale, President

No. 11 Circle St.

San Antonio, Texas

Leroy G. Denman, Esq.

215 W. Commerce St.

San Antonio, Texas

s/ C. MATTHEW PIENTKA

Subscribed and sworn to
before me this 28th day
of July 1939.

(Seal) s/ JOHN A. NEVROS

Notary Public, D. C.

My Commission Expires Aug. 15, 1943.

San Antonio, Texas

Jul 31 1939

10:30 P M

Post Office Department

Official Business

Registered Article

No. 69567

Return to NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D. C.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

C 1071

San Antonio Newspaper Guild

(Signature or name of addressee)

Mrs. Frank G. Ragsdale

(Signature of addressee's agent)

Date of delivery Jul 31, 1939

San Antonio, Texas

Jul 31 1939

10:30 P M

Post Office Department

Official Business

Registered Article

No. 69568

Return to NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D. C.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

C 1071

Express Publications Co.

Leroy G. Denman

(Signature or name of addressee)

Roland Valdez

(Signature of addressee's agent)

Date of delivery Jul 31, 1939

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9408

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

EXPRESS PUBLISHING COMPANY, RESPONDENT

Answer of Respondent

Filed February 16th, 1940

Answer of the Respondent to the Petition for Enforcement of an Order of the National Labor Relations Board

To the Honorable Judge of said Court:

The Express Publishing Company, answering the petition of the National Labor Relations Board filed herein, says:

(1) Answering paragraph one, admits that Respondent is a Texas corporation engaged in business in the State of Texas within this judicial circuit; denies that any unfair labor practices occurred; upon information and belief denies that the Court has jurisdiction, because the matters involved are not in reference to interstate commerce as more fully hereinafter alleged.

(2) Answering paragraph two, admits that the Board entered the order described in paragraph two; denies that it was justified by or based upon the evidence offered.

(3) Answering paragraph three, admits the service therein alleged.

(4) Answering paragraph four, admits the filing of the transcript.

(5) The Respondent denies that the Board is entitled to an order of this Court enforcing the order entered by the Board, and for grounds thereof says that the Board's order was based upon the following errors:

1. That the Board erred in failing to sustain the first exception of the Respondent in reference to the jurisdiction of the Board set out in paragraphs "A," "B," and "C" of the Respondent's answer, which paragraphs "A," "B," and "C" are as follows:

"A. The Board has no jurisdiction hereof, because the matter does not involve interstate commerce or anything within the Federal jurisdiction.

"B. The Board does not have jurisdiction, because the respondent's business, being a local business within the State of Texas, is not subject to jurisdiction of said Board.

"C. The Board does not have jurisdiction, because if any portion of respondent's business consists of interstate commerce, its relationship to the matters involved herein is so indirect and inconsequential that the matter involved herein is not within the jurisdiction."

2. That the Board erred in failing to sustain the second exception of the Respondent in reference to striking out or requiring an amendment of the complaint as set out in paragraph "D" of Respondent's answer, which paragraph "D" reads as follows:

"D. The complaint, in paragraph 6, is defective and fails to comply with Section 4 (c) of Article II of the Rules and Regulations of the Board in that it avers that the San Antonio Newspaper Guild, acting by and through its duly authorized representatives, Frank Ragsdale and Henry B. Dielman and others, requested respondent to bargain collectively, and fails to state the names of the individuals referred to by the term 'and others,' so that the respondent is unable to properly answer or prepare for trial thereon, and the said complaint should be dismissed or the said phrase 'and others' stricken out, or an amendment of the complaint be required to specify such names."

3. That the Board erred in failing to sustain the third exception of the Respondent in reference to striking out or requiring an amendment of the complaint as set out in paragraph "E" of Respondent's answer, which paragraph "E" reads as follows:

"E. The complaint in paragraph 9 is defective and fails to comply with Section 4 (c) of Article II of the Rules and Regulations of the Board in that it avers that by an alleged refusal to bargain collectively as set forth in the allegations of paragraph 6 and by the allegations in paragraph 8, 'and by various and sundry other means well known to respondent' that respondent interfered with, restrained, coerced, etc. employees, and fails to specify or designate the various and sundry other means referred to, and therefore fails to comply with said rule requiring a clear and concise statement of the facts constituting the alleged unfair labor practice or the names of individuals involved, and the time and place of occurrence, so that respondent is insufficiently advised of what complaint is made against respondent, so that respondent can not properly plead or prepare for trial thereon, and respondent says that said complaint should be dismissed, or the said words 'and by various and sundry other means well known to respondent' should be stricken out, or that an amendment should be required to the said complaint requiring compliance as aforesaid with the said rule."

4. That the Board erred in failing to sustain the fourth exception of the Respondent in reference to striking out or requiring an amendment of the complaint as set out in paragraph "F" of Respondent's answer, which paragraph "F" reads as follows:

"F. The amended charge, a copy of which is attached to the complaint, after specifying certain alleged actions on the part of the respondent, states that by the acts set forth in said paragraph 'and by other acts and conduct by its officers, agents and employees' inter-

fered with, restrained and coerced its employees, and fails to specify or designate the other acts and conduct referred to, and therefore fails to comply with said rule requiring a clear and concise statement of the facts constituting the alleged unfair labor practice or the names of individuals involved, and the time and place of occurrence, so that respondent is insufficiently advised of what complaint is made against respondent, so that respondent can not properly plead or prepare for trial thereon, and respondent says that said complaint should be dismissed, or the said words 'and by other acts and conduct it by its officers, agents, and employees,' should be stricken out, or that an amendment should be required to the said complaint requiring compliance as aforesaid with the said rule."

5. That the Board erred in failing to sustain the fifth exception of the Respondent which was to paragraphs six, seven, nine, and eleven of the complaint, and the intermediate report based thereon, because the complaint does not charge a violation of the National Labor Relations Act, in that it charges only that Respondent "refused to agree to any request made by the Union and refused to offer any character of counter proposal," in that the Wagner Act does not require the Respondent to agree to the Union's proposal or to make a counter proposal.

6. That the Board erred in failing to sustain the sixth exception of the Respondent that the complaint limits and defines its charge of refusal to bargain collectively to a refusal to agree to the Union's proposal and a refusal to offer a counter proposal, and the same therefore charges no violation of the law, because the Respondent under the Constitution of the United States cannot be required to make an agreement.

7. That the Board erred in failing to sustain the seventh exception of the Respondent which was to paragraphs eight, nine, and eleven of the complaint, in that the making of the statement referred to therein does not constitute a violation of the Wagner Act.

8. That the Board erred in failing to sustain the eighth exception of the Respondent to paragraphs eight, nine, and eleven of the complaint that the making of the statement referred to therein was a proper exercise of the freedom of speech guaranteed by the Constitution of the United States and the First Amendment thereto, and did not violate the Wagner Act.

9. That the Board erred in failing to sustain the ninth exception of the Respondent and refusing to strike out or require an amendment to aver particulars in the case of the language contained in paragraph nine of the complaint charging the Respondent with interfering with, restraining and coercing its employees by various and sundry other means well known to the respondent, in that there was no due process of law as required by the Fifth and Fourteenth Amendments to the Constitution of the United States to require the Respondent to go to trial upon such allegations without apprising Respondent in the complaint of the nature of the charge against Respondent, and the said complaint and the trial based thereon and

the examiner's report based thereon and the Board's order based thereon do not comply with the fundamental requirements of a fair trial.

10. That the Board erred in failing to sustain the tenth exception of the Respondent and finding that the Respondent caused Hall's statement to be read to its employees for the purpose of coercing them and discouraging the activities of the Guild, in that there is no evidence to support such finding.

11. That the Board erred in failing to sustain the eleventh exception of the Respondent and finding that the Respondent caused Hall's statement to be read to its employees for the purpose of coercing and discouraging the activities of the Guild, in that there is insufficient evidence to support such finding.

12. That the Board erred in failing to sustain the twelfth exception of the Respondent and finding that the effect of the activities of the Respondent has interfered with, restrained and coerced its employees, in that there is no evidence to support such finding.

13. That the Board erred in failing to sustain the thirteenth exception of the Respondent and finding that the Respondent has interfered with, restrained and coerced its employees, in that there is insufficient evidence to support the finding.

14. That the Board erred in failing to sustain the fourteenth exception of the Respondent and finding that Respondent has discouraged membership in the San Antonio Newspaper Guild, in that there is no evidence to support such finding.

15. That the Board erred in failing to sustain the fifteenth exception of the Respondent and finding that Respondent has discouraged membership in the San Antonio Newspaper Guild, in that there is insufficient evidence to support such finding;

16. That the Board erred in failing to sustain the sixteenth exception of the Respondent and finding that the statement read by Hall constituted a violation of the Wagner Act, because there was no evidence that the statement had any effect on any of the employees to coerce, interfere with, restrain or affect them in any manner.

17. The Board erred in failing to sustain the seventeenth exception of the Respondent and finding that the Respondent refused to submit a counter proposition to the Guild as a basis for negotiating, because there is no evidence to support such finding.

18. That the Board erred in failing to sustain the eighteenth exception of the Respondent and finding that the Respondent refused to discuss or negotiate over each paragraph of the proposal with the Guild's representatives, in that such finding is not supported by any evidence.

19. That the Board erred in failing to sustain the nineteenth exception of the Respondent and finding that the Respondent refused to submit a counter proposal, in that such finding is not supported by any evidence.

20. That the Board erred in failing to sustain the twentieth exception of the Respondent and finding that the Respondent refused

to negotiate, in that such finding is not supported by any evidence, it being shown by the undisputed evidence that the Respondent did negotiate but that the parties did not arrive at an agreement.

21. That the Board erred in failing to sustain the twenty-first exception of the Respondent and not finding in reference to the meeting of August 4 called by LeBaron, representative of the Labor Board, that Respondent was willing to meet for further negotiations if the Guild wanted to meet.

22. That the Board erred in failing to sustain the twenty-second exception of the Respondent and finding that the Respondent refused to bargain collectively with the Guild, because the undisputed evidence shows that the Respondent did not refuse to do so, but in fact did bargain collectively with the Guild as a representative of its employees.

23. That the Board erred in failing to sustain the twenty-third exception of the Respondent and finding that the activities of the Respondent have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce, in that it is shown by the evidence that same do not have any substantial connection with and do not obstruct interstate commerce or the free flow thereof, and said finding is not supported by the evidence.

24. That the Board erred in failing to sustain the twenty-fourth exception of the Respondent and basing its conclusions and order on the findings referred to in the foregoing paragraphs.

25. That the Board erred in failing to sustain the twenty-fifth exception of the Respondent and making findings not limited to the matters complained of in the complaint, in that the complaint charged merely that Hall's statement had the effect of discouraging membership and that Respondent had refused to agree to any proposal made by the Union and refused to offer a counter proposal, whereas the Board undertakes to find that the Respondent refused to bargain collectively and also that Respondent did in fact coerce and interfere with and restrain its employees from the exercise of the rights guaranteed to them by the Act and discourage membership in the Guild, so that the Board undertakes to find the Respondent guilty of violations of the Act not charged by the Complaint, in violation of the due process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and in denial of respondent's right to a fair and orderly trial.

27. That the Board erred in failing to sustain the twenty-seventh exception of the Respondent and ordering that the Respondent bargain collectively, when the evidence shows that it has been bargaining collectively with the Guild and that it has outstanding tenders and offers to continue to bargain collectively and that negotiations were broken off by the Guild and not by the Respondent.

28. That the Board erred in failing to sustain the twenty-eighth exception of the Respondent and ordering the Respondent to post

notices that it will cease and desist from interfering with, restraining or coercing its employees, in that Respondent denied, and still denies, that it has done so, and therefore said requirement which in fact requires Respondent to sign a confession or admission that it has been guilty of such unlawful practice and therefore will cease such practice, would be a violation and infringement upon the liberty of speech guaranteed by the First Amendment to the Constitution of the United States, since liberty of speech includes freedom to be silent as well as to speak, and would be a violation of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States guaranteeing due process of law. Said requirement exceeds the power vested in the Labor Board, which did not include the power to extort or require "confessions," especially where the party is denying the truth thereof.

29. That the Board erred in failing to sustain the twenty-ninth exception of the Respondent and in making the conclusions of law and the orders made, in that it appears from the entire proceedings by the undisputed evidence that the Respondent bargained collectively with the Guild as the representative of its employees in the Union, in full accord with the Act, but merely failed to reach an agreement, and that there was therefore no violation of the Act, since the Act requires only that Respondent bargain collectively and not that the parties reach an agreement.

30. In further response, the Respondent avers that its business consists of the publication of a morning and of an afternoon newspaper in the City of San Antonio; that as shown by the undisputed evidence, an inconsequential or nominal portion only of its circulation is transmitted in interstate commerce, and most of its circulation is in the City of San Antonio and the Counties immediately surrounding it in Southwest Texas; that its employees are all local employees within the State of Texas, principally in the City of San Antonio, and its only place of business is in the City of San Antonio, Texas; that while it purchases a portion of its supplies in the way of blank paper and a portion of its ink from outside the State of Texas, and other small physical materials that are not the consequential portions of its business, its important business being the news and editorial articles written and published by it for the service of its patrons in Southwest Texas, and incidental thereto advertising displayed in its papers for persons desiring to advertise their merchandise in Southwest Texas; that as shown by the evidence, the news and editorial departments involved in this matter are all local employees in the City of San Antonio, Texas, whose activities are wholly within the State of Texas; that the Respondent's newspapers are essentially local papers, published for the local field entirely within San Antonio and its trade territory within Southwest Texas, so that Respondent believes, and upon such belief avers, that the Board was without jurisdiction.

31. The Respondent further avers that it appears by the undisputed evidence that the statement complained of read by Hall consisted

of two portions: First, a statement of the meaning of the Wagner Act and that the statement was a correct statement of the law in reference thereto; and Second, a claim asserted on behalf of the Respondent that it was entitled to the credit for the expenditures it had made for the betterment of working conditions among its employees. It would be a denial of the freedom of speech guaranteed by the provisions of the Constitution above referred to deny the Respondent the right to state the contents of the Wagner Act, and that it would be a denial of the freedom of speech guaranteed by said provisions of the Constitution to deny to the Respondent the right to claim credit for the expenditures made by it out of its own funds for the betterment of the working conditions of its employees. Therefore, the Board erred in finding that the said statement was made in violation of the Wagner Act.

32. The Board erred in finding that the statement made by Hall had the effect of coercing, etc., the employees, for there was no evidence that any employee withdrew from the Guild or refused to join the Guild by reason of such statement or was coerced or intimidated or affected in any manner thereby, and such finding was without any evidence to support it. Respondent believes, and therefore alleges, that to sustain the finding of such a violation it would be necessary that there be evidence not only that such a statement was made, but that it did in fact have the effect of coercing, etc., the employees, and there being no such evidence, the Board erred in finding such violation of the Wagner Act and basing its order thereon.

33. The Board erred in finding that the Respondent refused to bargain collectively and therefore violated the Wagner Act, because the undisputed evidence shows that upon the request of the Guild to bargain collectively the Respondent promptly met with the Guild's representatives; that the Guild presented a written proposed contract to Respondent; that Respondent considered the contract with care and met again with the Guild's representatives and negotiated both orally and in writing with the Guild's representatives, setting out in great detail the reasons why it considered each portion of the proposed contract unacceptable to it; that a number of meetings were held and negotiations carried on at great length; that although the Guild's representatives admitted that the proposal they had made was unwarranted and unjustified and unreasonable, they refused to make any other proposal; that the Respondent contended that the terms of employment as they presently existed were reasonable, and the parties were unable to agree, so that it appeared from the undisputed evidence that the Respondent did bargain collectively, and the Board's finding to the contrary is not supported by the evidence and its order based thereon is in error.

34. The Respondent avers that as shown by the undisputed evidence the Guild proposals consisted of principally (1) Various provisions which would increase the cost of employment, and (2) Various restrictions, direct and indirect, upon the Respondent's power to employ or discharge in said departments or control its editorial and news

policies. The undisputed evidence shows that these differences were discussed both in writing and orally and bargained over at great length by the numerous representatives of the Guild and the Respondent, and the parties could not come to an agreement. The Respondent avers that the obligation to bargain collectively does not require the Respondent to enter into any agreement increasing its costs if it deems that it should not do so; likewise, that the Wagner Act does not require the Respondent to abandon its present policy of retaining its power to employ and discharge at will with full control over its editorial and news departments; that the evidence shows that it was the Respondent's policy, arrived at in good faith and continued without variation since the founding of its newspapers, to retain such control of its editorial and news departments so as to maintain its independence as a free press, and that while the Wagner Act in cases involving interstate commerce imposed a duty upon the employer to bargain collectively as to whether it was willing to relinquish or restrict its right to employ and discharge and its power to control its news and editorial departments, it did not in any manner impose any obligation upon Respondent to be persuaded in such bargaining to contract away its freedom to conduct its editorial and news departments according to its own belief as to the manner in which they would best serve its function as a free press. And Respondent avers that the findings and order of the Board are based upon the theory that the Wagner Act imposes upon the Respondent not merely the obligation to bargain with the Guild as to whether it is willing to contract and barter away such freedom, but also the obligation, regardless of whether by such bargaining it is convinced of the wisdom thereof, to in fact enter into a contract of some nature to limit its rights in these respects. Respondent avers on the contrary that there is nothing in the Wagner Act requiring the Respondent to abandon its practice of employing persons in its editorial and news departments subject to termination of such employment at any time either by the employer or by the employee at will; and there is nothing in the Wagner Act which requires it to enter into any agreement fixing arbitrary standards for advancement of employees in such departments according to longevity of service or other artificial standards rather than the Respondent's belief in their professional ability or their ability to best aid in enunciating and promulgating the editorial and public principles represented by the Respondent's newspapers.

Wherefore, the Respondent respectfully says that the petition to enforce the Board's order should be denied.

EXPRESS PUBLISHING COMPANY, *Respondent.*
By DENMAN, FRANKLIN & DENMAN.
(Signed) LEROY G. DENMAN.
(Signed) LEROY G. DENMAN, JR.,
Attorneys.

THE STATE OF TEXAS,
County of Bexar.

Frank G. Huntress, being duly sworn, states that he is the President of the Express Publishing Company; that he is authorized to and does make this verification in behalf of the Express Publishing Company; that he has read the foregoing answer and has knowledge of the contents thereof and that the statements made therein are true to the best of his knowledge, information and belief.

(Signed) FRANK G. HUNTRESS.

Subscribed and sworn to before me by Frank G. Huntress this 3rd day of February, A. D. 1940.

(Signed) W. A. DRUCE,
Notary Public within and for Bexar County, Texas.

Argument and submission

Extract from the Minutes of April 15th, 1940

No. 9408

NATIONAL LABOR RELATIONS BOARD
versus
EXPRESS PUBLISHING COMPANY

On this day this cause was called, and, after argument by Mortimer B. Wolf, Esq., Attorney, National Labor Relations Board, for petitioner, and Leroy G. Denman, Esq., for respondent, was submitted to the Court.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 9408

NATIONAL LABOR RELATIONS BOARD, PETITIONER
versus
EXPRESS PUBLISHING COMPANY, RESPONDENT

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(May 7, 1940)

Before SIBLEY, HOLMES, and MCCORD, Circuit Judges

HOLMES, Circuit Judge: The respondent, a Texas corporation engaged at San Antonio in the publication of the Morning Express and the Evening News, was found guilty of unfair labor practices by petitioner, and ordered to cease and desist therefrom, as well as

to take certain affirmative action which the petitioner found would effectuate the policies of the National Labor Relations Act, the order being issued pursuant to Section 10 (c), and the jurisdiction of this court being based upon Section 10 (e), of the act. 49 Stat. 449, 29 U. S. C. A. 151, et seq.

The Board found that respondent had refused to bargain collectively with the San Antonio Newspaper Guild, a labor organization, contrary to Section 8 (1) and (5) of the act, and that respondent, by reading a certain statement to its employees, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the act, contrary to Section 8 (1) of the act. In addition to requiring respondent to cease and desist from the unfair labor practices found, the Board ordered it to bargain collectively with the Guild, and, if an understanding were reached, to embody it, upon request, in a signed agreement, and to post appropriate notices. The respondent does not object to putting into the form of a signed agreement any understanding which may be reached with the Guild, but denies that there is any evidence in the record to support the findings of the Board.

An analysis of the evidence, and even the argument of counsel for the Board, reduce the question of a refusal to bargain collectively with the Guild to the good faith of the respondent in conducting the negotiations. The facts appear partly in written negotiations, and partly in stenographic reports of the meetings at which the negotiations were had, all of which are stipulated. The Guild's representatives were promptly recognized by the employer, and negotiations conducted at great length. In March 1938, the Guild asked for a meeting to bargain. A date was agreed upon, the meeting held, and the bargaining commenced.

The Guild submitted a contract with many provisions. The employer read a statement outlining its position. It expressed a willingness to exchange viewpoints with the Guild, to consider its proposals, and to notify it as the representative of the employees; and yet we think there was evidence to support the finding of the Board that respondent had determined in advance never to agree to anything. In law this was a refusal to bargain. Of course respondent was not bound to make any agreement, and technically it was not bound to make a counterproposal, but it was required to meet its employees with an open mind, and, if it was unwilling to do more than maintain its present status, to say so, and to express a willingness to have that as the agreement between them. It looks to us like both sides were sparring more to make a record to go before the Board than trying to get at anything practical. They are both to blame that nothing whatever came out of the negotiations.

The Board's finding that respondent interfered with its employees' right of self-organization and collective bargaining is based upon a statement of the employer read to its employees a few days after the respondent had rejected the Guild's proposal. It is argued that this statement was intended to impress upon the employees that

they did not need a labor organization; that respondent was giving them fair working conditions, and that a labor organization could obtain no improvements for them. There is nothing in the statement to support the finding that it was intended to impress upon the employees that they did not need a labor organization, and the respondent denies that such was the purpose or effect of the statement. The burden of proof was on petitioner as to this charge in the complaint, and we find no evidence at all which meets that burden.

Some of respondent's employees had come directly to it, asking what would be the effect of their joining the union. It undertook to tell them what its understanding of the matter was, and told them truthfully. Its spokesman offered to testify that he did not intend any interference with union activities, and, to prevent his doing so, the complaint was amended by striking out the allegation about intention and substituting an allegation that it had the effect of obstructing the union. No evidence whatever was introduced that it had any such effect on anybody. The employee who had propounded the question went ahead and joined the union; and that is all we have on the subject. We find no evidence to support the finding that what respondent did in this respect was an unfair labor practice.

The order of the Board will be modified by striking out all of it except that part which directs the respondent, upon request, to bargain collectively with the San Antonio Newspaper Guild as the exclusive representative of respondent's employees named in the order. As so modified, the order will be enforced.

In the United States Circuit Court of Appeals for the Fifth Circuit

Decree

Extract from the minutes of May 7th, 1940

No. 9408

NATIONAL LABOR RELATIONS BOARD

versus

EXPRESS PUBLISHING COMPANY

This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of the order of said National Labor Relations Board entered on July 28, 1939, "In the Matter of Express Publishing Company and San Antonio Newspaper Guild," Case No. C–1071, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the order of the said National Labor Relations Board be modified so as to read, as follows:

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Express Publishing Company, San Antonio, Texas, and its officers, agents, succes-

sors, and assigns shall take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Upon request, bargain collectively with the San Antonio Newspaper Guild as the exclusive representative of the city editors, reporters, copy desk men and rewrite men, artists, photographers, copy boys, and librarians, society editors and writers, and sports editors and writers in the editorial departments of both the San Antonio Express and San Antonio News, with respect to rates of pay, hours of employment, and other conditions of employment, and if an understanding is reached on any such matters, embody said understanding in a signed agreement, if requested to do so by the Guild.

"(b) Notify the San Antonio Newspaper Guild, as the exclusive representative of the aforesaid employees, within ten days from date hereof, of its willingness to comply with this order.

"(c) Notify the regional director for the Sixteenth Region in writing, within ten days from the date of this order, what steps respondent has taken to comply herewith,"

and as so modified, said order shall be enforced.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 9408

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXPRESS PUBLISHING COMPANY, RESPONDENT

PETITION OF NATIONAL LABOR RELATIONS BOARD FOR REHEARING AND FOR ORAL ARGUMENT ON THIS PETITION

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The National Labor Relations Board respectfully petitions this Honorable Court for a rehearing in the above-entitled cause, and for oral argument on this petition. In support of this petition, the Board respectfully shows to the Court as follows:

I

The court erred in refusing enforcement to paragraphs 1 (a), 1 (b), 2 (b), and 2 (c) of the Board's order

The decision of this Court, issued May 7, 1940, provides that—

"The order of the Board will be modified by striking out all of it except that part which directs the respondent upon request, to bargain collectively with the San Antonio Newspaper Guild as the exclusive representative of respondent's employees named in the order. As so modified, the order will be enforced."

The effect of this direction is to grant enforcement only to paragraph 2 (a) of the Board's order, which requires respondent, as affirmative action, to bargain collectively with the Guild, embodying in a signed agreement such understandings as may be reached. As phrased, the opinion denies enforcement to the following portions of the order: (1) the requirement that respondent cease and desist from refusing to bargain collectively with the Guild (paragraph 1 (a)); (2) the requirement that respondent cease and desist from interfering with, restraining, and coercing its employees in the exercise of their rights of self-organization and collective bargaining (paragraph 1 (b)); (3) the affirmative requirement that respondent post notices informing its employees that it will cease engaging in unfair labor practices and will bargain collectively with the Guild (paragraph 2 (b)); (4) the affirmative requirement that respondent notify the Board's Regional Director what steps it has taken to comply with the order (paragraph 2 (c)).

The Board is of the view that the enforceability of these provisions of its order is firmly established by the decisions of the Supreme Court and of this and other Circuit Courts of Appeals. We shall consider briefly each of the provisions stricken from the order.

1. Cease and desist from refusing to bargain.—In view of the fact that the Court expressly affirmed the Board's finding that respondent refused to bargain collectively with the Guild and has granted enforcement to the affirmative portion of the collective bargaining order, the failure similarly to enforce the cease and desist provision relating to collective bargaining may have been purely inadvertent. It is, of course, well-settled that under Section 10 (c) of the Act the entry of a cease and desist order is mandatory upon the Board with respect to each unfair labor practice in which the employer is found to have engaged. The Supreme Court in National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 265, made this abundantly plain, stating—

"* * * § 10 (c) directs that when the Board finds that any person has engaged in unfair labor practices it 'shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act * * *.'

"Notwithstanding the mandatory form of § 10 (c), its provisions in substance leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an *affirmative* order, and in choosing the particular *affirmative* relief to be ordered. Hence, *upon the challenge of the affirmative part of an order* of the Board, we look to the act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy." [Italics supplied.]

It is clear from this language, as it is from the Act, that while a

discretionary power is confided to the Board to determine the proper form of affirmative action (the Greyhound case, supra; National Labor Relations Board v. Mackay Radio Co., 304 U. S. 333, 348) no discretion is left where the question is whether a cease-and-desist order shall issue. The Act itself requires such an order as to any unfair labor practice found, and this direction is binding upon both the Board and the Court. See National Labor Relations Board v. Bradford Dyeing Ass'n (U. S. Sup. Ct.), decided May 20, 1940. Not only is the failure to enforce the order to cease and desist from refusing to bargain collectively contrary to the Supreme Court's construction of Section 10 (c), but it is inconsistent with the result reached by this Court in other decisions. National Labor Relations Board v. Lane Cotton Mills, decided May 9, 1940; National Labor Relations Board v. Whittier Mills Company, etc., decided May 2, 1940; Mexia Textile Mills v. National Labor Relations Board, 110 F. (2d) 565; National Labor Relations Board v. Brown Paper Mill Co., 108 F. (2d) 867.

2. Cease and desist from interfering with the rights guaranteed in Section 7 of the Act.—The Court's refusal to enforce this provision of the cease-and-desist order presumably resulted from its rejection of the Board's finding that Secretary Hall's statement of April 4, 1938, was an interference with the rights of petitioner's employees. However, entirely apart from the Board's finding with respect to the Hall statement, there exists a wholly independent ground, apparently overlooked by the Court, upon the basis of which paragraph 1 (b) was entitled to enforcement. We refer to the fact that a violation of Section 8 (5), or any other subdivision of Section 8, constitutes an interference with the rights of self-organization and concerted activity guaranteed in Section 7, and hence is violative of Section 8 (1) as well. The correctness of this proposition is now established beyond debate. The Congress expressly so stated,[1] and the overwhelming weight of authority is in accord. We call the attention of the Court particularly to the recent holdings of the Circuit Courts of Appeals for the Second and Fourth Circuits in Art Metal Construction Company v. National Labor Relations Board, 110 F. (2d) 148, 150–151 (C. C. A. 2), and National Labor Relations Board v. Highland Park Mfg. Co., 110 F. (2d) 632, 639 (C. C. A. 4). In the Art Metal case the Court, per Judge Learned Hand held:

"Article I (b) of the order rests upon the premise that an unfair labor practice under § 8 (5) is also an unfair practice under § 8 (1), and that is contrary to our ruling in N. L. R. B. v. Remington-Rand,

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[1] "The succeeding unfair labor practices are intended to amplify and state more specifically certain type of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1)." (House Report No. 1147, 74th Cong., 1st Sess., p. 17.)

"The four succeeding unfair labor practices are designed not to impose limitations or restrictions upon the general guarantees of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome." (Senate Report No. 573, 74th Cong., 1st Sess., p. 9).

94 Fed. (2d) 862, 869, which the Board has since then consistently refused to follow. Globe Cotton Mills v. N. L. R. B., 103 Fed. (2d) 91 (C. C. A. 5), accords with us, but N. L. R. B. v. Biles-Coleman L. Co., 98 Fed. (2d) 18, 22, 23 (C. C. A. 9) is contrary. Except for the new light now thrown upon the matter, we should still be unconvinced; but we learn that both the Committee of the House and the Committee of the Senate in reporting the bill declared that §§ 8 (2), 8 (3), 8 (4), and 8 (5) were species of the generic unfair labor practice defined in § 8 (1). Certainly the language does not so plainly forbid that construction that we must disregard it; on the contrary, we consider it authoritative. For that reason we overrule our holding—it was in no sense a dictum—in N. L. R. B. v. Remington-Rand, Inc., supra (94 Fed. (2d) 862, 869)."

To the same effect is the statement of Judge Parker for the Court in the Highland Park decision:

"There can be no question, we think, but that a refusal to bargain collectively with representatives chosen by employees amounts to an interference with their right of self-organization for the purpose of collective bargaining within the meaning of the Act; and it is interesting to note that the decision to the contrary by the Second Circuit in the Remington-Rand case, 94 F. (2d) 862, has just been overruled by that court in the recent Art Metals Construction Co. case, supra. To like effect is the decision of the Ninth Circuit in the case of N. L. R. B. v. Biles-Coleman Lumber Co., 9 Cir. 98 F. (2d) 18, 22–23. And we think it clear that it was proper for the order to forbid generally any interference with the right of self-organization and not merely the particular kind of interference covered by the findings of the Board. N. L. R. B. v. Swift & Co., 7 Cir. 108 F. (2d) 988."

The Third, Sixth, and Ninth Circuit Courts of Appeals are in accord. National Labor Relations Board v. Griswold Manufacturing Company, 106 F. (2d) 713, 715–716 (C. C. A. 3); National Labor Relations Board v. Louisville Refining Co., 102 F. (2d) 678 (C. C. A. 6) cert. den., 308 U. S. 568; National Labor Relations Board v. Carlisle Lumber Co., 94 F. (2d) 138 (C. C. A. 9) cert. den., 304 U. S. 575; National Labor Relations Board v. Biles-Coleman Lumber Co., 98 F. (2d) 18, 22–23 (C. C. A. 9). No circuit is now to the contrary, except that the point appears to be unsettled in this Circuit.

This Court, in National Labor Relations Board v. Lane Cotton Mills Co., decided 2 days after the decision in the instant case, indicated its acceptance of the prevailing rule, declaring:

"The respondent's flat refusal to bargain with the T. W. O. C. or its committee supports the finding that Lane had interfered with its employees in the exercise of the rights guaranteed by Section 7 by refusing to bargain collectively within the meaning of Section 8 (5)."

The resolution of the conflict between the present case and the Lane Cotton Mills decision in accordance with the correct rule laid down

in the latter case is, we submit, essential to the orderly and effective administration of the Act.[2]

3. Post appropriate notices. The requirement that respondent post notices to its employees stating that it will cease and desist from its unfair labor practi[illegible] and will bargain collectively as directed by the Board is in the fo[illegible]peatedly approved by this Court.[3] No reason whatever is given by the Court or suggests itself why this provision of the order should not be enforced. The Supreme Court, in National Labor Relations Board v. Falk Corporation, 308 U. S. 453, recently sustained the validity of precisely such an order in the following words:

"The Court also modified the Board's order by omitting the requirement that the notices to be posted in the plant contain a statement that the company would cease and desist' from its unlawful activities. As stated in the first opinion of the court below, the purpose of the Board in requiring the company to publish notices assuring its employees that it would 'cease and desist' had been 'to convey to the employees the knowledge of a guarantee of an unhampered right in the future to determine their own labor affiliations.' Knowledge on the part of the men that the company would cease and desist from hampering, interfering with, and coercing them in selection of a bargaining agent, which the Board found the company had done successfully in the past, was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor."

This holding of the Falk decision was expressly reaffirmed by the Supreme Court in the Bradford Dyeing case, supra.

4. Notification of compliance.—Finally, the direction to notify the Board's Regional Director what steps have been taken to comply with the order is a requirement whose validity is so well settled, which is so eminently reasonable, and so important to proper administrative supervision of compliance that the Court's failure to enforce it cannot have been other than inadvertent. In none of the approximately 150 cases decided under the Act by the United States Supreme Court and by the Circuit Courts of Appeals, including this Court, has the validity or propriety of this provision been impugned in any

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[2] National Labor Relations Board v. Whittier Mills Co., decided by this Court on May 2, 1940, is likewise consistent with the Lane Cotton Mills decision and inconsistent with the present case. There the Court upheld the Board's determination that certain facts which the Board found to constitute a violation of Section 8 (5), "interfered with and coerced" employees in the exercise of their organizational rights, and hence violated Section 8 (1). In the light of these express adjudications, we submit that the contrary rule laid down in the earlier Globe Cotton Mills decision, 103 F. (2d) 91, can no longer be regarded as the doctrine of this Court.

[3] Agwilines, Inc. v. National Labor Relations Board, 87 F. (2d) 146; National Labor Relations Board v. Pure Oil Co., 103 F. (2d) 497; National Labor Relations Board v. Brown Paper Mill Co., 108 F. (2d) 867; National Labor Relations Board v. Whittier Mills Co., decided May 2, 1940; National Labor Relations Board v. Lane Cotton Mills, decided January 5, 1940. In the Brown Paper decision the Court said:

"Respondent's complaint of the order, that it requires it to confess the guilt it has all along denied, and that, if it publishes the notices the order requires, it will be not only confessing sin, but in the position of advising its employees that they cannot organize and maintain an independent union, is not well taken. The order is in the usual form, approved by this Court in numerous cases, beginning with Agwilines v. National Labor Relations Board, 87 Fed. (2d) 146. It requires no confession. It merely orders appellant to state that it will comply with the Board's order. It has judicial precedent in the decree in the Clerk's case, and it in no manner interferes with or purports to interfere with the exercise by the employees of their truly independent choice."

way. It has uniformly been enforced in the past and should be enforced in this case.

II

The Court erred in holding that a showing of the actual coercive effect of employer conduct is prerequisite to a finding that such conduct violates Section 8 (1)

The Court's refusal to sustain the Board's finding that the Hall statement constituted an interference with the free exercise of the rights guaranteed to employees in Section 7 of the Act appears to be based, in part at least, upon the absence of any showing that the statement induced any of respondent's employees to abandon the Guild. In this, we submit, the Court erred. The Act does not require, as a prerequisite to a finding that employer activity is violative of Section 8 (1), a showing that the conduct in question actually coerced the employees toward whom it was directed. Once the employer has been shown to have engaged in conduct reasonably calculated to "interfere with, restrain, or coerce" employees in the exercise of their right to self-organization, the Act itself supplies the connection between the deed and the result. The situation is analogous to that presented where the question is whether an employer's unfair labor practices "affect commerce" within the meaning of the Act. When the employer's business is shown to be such that the occurrence of a strike or other labor dispute would be capable of interfering with or obstructing interstate or foreign commerce, the Act applies. It is unnecessary to show that the unfair labor practices did, in fact, result in the obstruction or interruption of interstate commerce; it is sufficient that, in the words of Section I of the Act, "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury," and that "The denial by employers of the right of employees to organize * * * leads to strikes and other forms of industrial strife" which burden commerce. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 41; Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 222.

Similarly, "experience has proved" that certain conduct of employers normally inhibits and interferes with the free exercise by employees of their right to join and act through unions. True, some employees may have greater powers of resistance to employer pressure than other employees. But the question whether the Act has been violated cannot be made to depend upon the capacity or incapacity of particular individuals to withstand employer coercion. The standards of conduct which the Act sets up are, necessarily, general and objective. The question in a given case is not whether a particular employee was coerced by certain employer behaviour into abandoning his rights under the Act, but whether the expert body empowered by Congress to draw the inferences as to the meaning and effect of

employer conduct could reasonably conclude that the conduct in question would normally tend to restrain employees in the exercise of their statutory rights: To substitute for this simple, clear, objective rule a test by which the legality or illegality of an employer's actions would be made to depend on the degree of sensitivity of particular employees, would make impossible the formulation of definite standards of conduct under the Act. The statute aims not only at the remedying of the effects of actual employer coercion, but at the *prevention* of conduct shown by experience to result in such coercion. As with the question whether unfair labor practices "affect commerce," the application of the Act need not await a showing that the employer's unfair labor practices have succeeded in accomplishing their unlawful purpose. "Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act." Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 222.

These conclusions are reinforced by judicial authority. In System Federation No. 40 v. Virginian Railway Co., 11 F. Supp. 621, affirmed 84 F. (2d) 641 (C. C. A. 4), affirmed 300 U. S. 515, one of the questions at issue was whether the so-called Sasser statement constituted an interference with the right of the railway employees to self-organization. The District Court held (11 F. (Supp. at 633)):

"In addition, I hardly think that any one can read with an open mind the Sasser statement referred to and quoted at length above without fairly concluding that it was printed and circulated to "use the authority and power" of the Railway "to induce action" by the members of the craft "in derogation of what the statute calls 'self-organization'." *That it probably and naturally had the intended effect on many of those to whom it was delivered is no more than a reasonable inference to be drawn from the situation and power of the author over those to whom it was addressed.* It is likewise clear that similar acts will be continued in the future to defeat or seriously interfere with self-organization and representation unless prohibited." [Italics supplied.]

This language, which was given full approval by the Circuit Court of Appeals for the Fourth Circuit (84 F. (2d) at 643–644), clearly recognizes that the actual coerciveness of particular employer conduct need not be affirmatively shown, but is "a reasonable inference to be drawn from the situation * * *." Similarly, in National Labor Relations Board v. A. S. Abell Co., 97 F. (2d) 951, 956 (C. C. A. 4), the court upheld an order of the Board directing an employer to cease and desist from interfering with the rights guaranteed in Section 7 of the Act, despite the fact that, in the Court's words—

"There was no evidence that any employee of the pressroom was actually coerced or restrained from joining the Union or from remaining a Union member when once he had joined."

Finally, in its recent decision in National Labor Relations Board v. Whittier Mills Co., decided May 2, 1940, this Court itself expressed its approval of the rule for which we are here contending. In that case

the Court upheld the Board's finding that certain employer conduct "necessarily discouraged the employees in maintaining their connection with and representation by" a union committee, despite the absence of any "express proof that any employee was in fact affected or changed his course thereby." In no decision except that in the present case has any court required proof of this kind as prerequisite to enforcement of the Board's order.

We respectfully submit that the rule laid down in the instant case misconceives the true basis for determining the legality of employer conduct under the Act; is inconsistent with other decisions of this Court; and is impossible of practical application. We earnestly request that the Court reconsider and modify its holding in accordance with the principles herein set out.

CONCLUSION

Wherefore it is prayed that a rehearing of this case be granted and that on such reconsideration the decision of the Court herein be modified in the manner above suggested. In the event that the Court is in doubt as to the merits of any ground made the basis of this petition, the Board urges that because of the serious importance of the questions involved, it be given an opportunity to present its position in oral argument before the Court. The questions are important because it is contrary to the entire design of the statute that, when the reviewing court has approved the Board's findings that unfair labor practices were committed, provisions of the Board's order based upon such findings and of established validity under the Act and controlling decisions, should nevertheless be denied enforcement. Refusal to enforce valid portions of a Board order, particularly injunctive cease and desist provisions intended to operate in futuro, eliminates most of the bases for contempt proceedings, the ultimate and sole sanction provided by Congress for enforcement of the Act. In the words of the Supreme Court in its recent Bradford Dyeing decision, supra—

"Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a 'hearing,' which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence, and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order."

Respectfully submitted.

CHARLES FAHY,
General Counsel,
ROBERT B. WATTS,
Associate General Counsel,
National Labor Relations Board.

Certificate of counsel

Comes now Charles Fahy, General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith, and not for purposes of delay.

CHARLES FAHY.

Washington, D. C., May 1940.

Order denying rehearing

Extract from the Minutes of June 17th, 1940

No. 9408

NATIONAL LABOR RELATIONS BOARD

versus

EXPRESS PUBLISHING COMPANY

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 77 to 110, next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9408, wherein National Labor Relations Board is petitioner, and Express Publishing Company is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, Volume I, numbered from 1 to 76, are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of August, A. D. 1940.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.
By ——— ———, *Deputy Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1940

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 442

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXPRESS PUBLISHING COMPANY

It is hereby stipulated and agreed by and between the attorneys for the above-named parties that for the use of the Court on petition for writ of certiorari the record in the above case shall consist of the following:

1. Volume I: The transcript of record of the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit.
2. Volume II: The Appendix to Petitioner's Brief, Part I, filed in the United States Circuit Court of Appeals for the Fifth Circuit.
3. Volume III: The Appendix to Petitioner's Brief, Part II, filed in the United States Circuit Court of Appeals for the Fifth Circuit.
4. Volume IV: Copy of Respondent's Exhibit 1, Appendix to Respondent's Brief, filed in the United States Circuit Court of Appeals for the Fifth Circuit.
5. The typewritten transcript of the entire record of the proceedings before the National Labor Relations Board, together with the original exhibits filed in the United States Circuit Court of Appeals for the Fifth Circuit.

It is further stipulated and agreed that in the event the petition for a writ of certiorari is granted, a record shall be printed under the direction of the Clerk of the United States Supreme Court to include such portions of the proceedings before the National Labor Relations Board and before the United States Circuit Court of Appeals for the Fifth Circuit as may be stipulated by the parties pursuant to Rule 38, Section 8, of the Revised Rules of the Supreme Court.

N. A. TOWNSEND,
Acting Solicitor General.
LEROY G. DENMAN,
Counsel for the Respondent.

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Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In Supreme Court of the United States

Stipulation in re record on writ of certiorari

Filed Dec. 9, 1940

It is hereby stipulated and agreed by and between the attorneys for the above-named parties that the record filed in this Court with the petition for certiorari may be used in the hearing of this case on the merits and no further printing is necessary.

FRANCIS BIDDLE,
Solicitor General,
Counsel for Petitioner.
LEROY G. DENMAN,
Counsel for Respondent.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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